Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

GLOVER BOTTLED GAS CORP., VOGEL'S, INC., NEW YORK PROPANE CORP., SYNERGY GAS CORP., AND SYNERGY GROUP, INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' refusal to review the Board's application of the *Woolworth* formula to a particular discriminatee under the doctrine of *res judicata*, conflicts with *La Favorita v. NLRB*, 48 F.3d 1232 (10th Cir. 1995) and other decisions.

2. Whether the Court of Appeals' enforcement of the Board's Order regarding Leone's and Cabral's backpay violates applicable law and conflicts with other circuit decisions inasmuch as the Board failed to consider their willful loss of interim earnings.

LIST OF PARTIES

The parties to the proceedings below were Petitioners Glover Bottled Gas Corp., Vogel's, Inc., New York Propane Corp., Synergy Gas Corp., and Synergy Group, Inc., and Respondent National Labor Relations Board.

RULE 29.1 DISCLOSURE

Synergy Group, Inc., is the parent company of the other named Petitioners in this action. Synergy Group, Inc., and these other Petitioners have no subsidiaries other than wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Glover Bottled Gas Corp., Vogel's, Inc., New York Propane Corp., Synergy Gas Corp., and Synergy Group, Inc., pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit enforcing a decision and order of the National Labor Relations Board.

OPINIONS BELOW

The opinion below of the District of Columbia Circuit Court of Appeals is reported at 47 F.3d 1230 (D.C. Cir. 1995). It is reprinted, along with the judgment of the Court, in the Appendix hereto as App. A, *infra*, 1a-4a. The decision and order below of the National Labor Relations Board is reported at 313 NLRB 43 (1988), affirming the decision of Administrative Law Judge James F. Morton. Those decisions are reprinted in the Appendix hereto as App. B, *infra*, 5a-24a.

STATEMENT OF JURISDICTION

This case originally came before the District of Columbia Circuit Court of Appeals upon the petition of Glover Bottled Gas Corp., Vogel's, Inc., New York Propane Corp., Synergy Gas Corp., and Synergy Group, Inc. (hereafter "Petitioners") for review of an order of the National Labor Relations Board (hereafter "Respondent" or the "Board"), pursuant to Section 10(f) of the National Labor Relations Act, as amended (hereafter the "Act"), 29 U.S.C. § 160(f). Respondent filed a cross-application for enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e).

By opinion dated and entered March 3, 1995, the Circuit Court granted Respondent's cross-application for enforcement and denied the petition for review. (*See, infra*, App. A., 3a-4a).

The jurisdiction of this Court to review the judgment and opinion of the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(c):

(c) Reduction of testimony to writing; findings and orders of Board

... If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

STATEMENT OF THE CASE

A. Relevant Background

Petitioners Glover Bottled Gas Corp., Vogel's Inc., New York Propane Corp., Synergy Gas Corp., and Synergy Group,

Inc., are New York corporations engaged in the non-retail sale and distribution of propane gas and related products, with its principal office and place of business in Farmingdale, New York. Petitioners have facilities located in Long Island and Brooklyn, New York.

Petitioner Glover Bottled Gas Corp., ("Glover") and Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") were parties to a collective bargaining agreement covering all drivers, platform men and servicemen employed at Glover's facility. This agreement expired on July 31, 1982. Between August 1982 and February 1983, Glover and the Union held several bargaining sessions, but were unable to reach the terms of a new agreement. On February 3, 1983, fifteen Glover employees represented by the Union, including Joseph Leone ("Leone") and Robert Cabral ("Cabral") commenced an economic strike.

During the course of the strike, Glover hired eleven permanent replacements for the striking employees. As the strike proved unsuccessful, on April 15, 1983 the Union made an unconditional offer to return to work on behalf of all the striking employees. In response, Glover reinstated three of the striking employees.

B. Unfair Labor Practice Proceedings

Thereafter, the Union filed charges with the Board alleging several unfair labor practices in violation of the National Labor Relations Act ("Act"). Specifically, the Union alleged that, although there were numerous openings and sufficient work, Glover declined to reinstate any of the remaining twelve strikers, including Leone and Cabral, in violation of Section 8(a)(1) and (3) of the Act.

The Union also alleged that in June 1984, Glover violated Section 8(a)(1), (4) and (5) of the Act by unilaterally instituting a mandatory polygraph examination policy, and shortly thereafter discharging an employee, Ralph Kendrick ("Kendrick") who, *inter alia*, expressed his intention not to submit to any polygraph examination in violation of Glover's policy. These various allegations were eventually consolidated, and in May and June of 1986, hearings were conducted in connection with them before Board Administrative Law Judge Philip P. McLeod ("ALJ McLeod").

On August 26, 1987, ALJ McLeod issued his decision, finding that the Petitioners had unlawfully refused to reinstate the striking employees following their unconditional offers to return to work and had discharged Kendrick in violation of the Act. This decision was upheld by the Board on February 8, 1989 and is reported at 292 NLRB 873 (1989). Additionally, the Board ordered that Petitioners were required to "make whole Ralph Kendrick and (the) striking employees . . . with backpay to be computed in the manner prescribed in *F.W. Woolworth. . .*" Both the Board and ALJ McLeod's decisions are reprinted in the Appendix hereto as App. C, *infra*, 25a-83a.

The Board's decision was subsequently upheld by the Court of Appeals for the Second Circuit in *NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681 (2d Cir. 1990) and is reprinted in the Appendix hereto as App. D, *infra*, 84a-94a. As the parties submitted briefs *solely* on the issue of whether Petitioners committed any unfair labor practices, the Second Circuit did not address or otherwise mention the Board's backpay remedy which would eventually be considered in future supplemental proceedings. Particularly, no consideration was given, whatsoever, by the parties and the Second Circuit on any issues pertaining to backpay including the application of the *Woolworth* formula to Kendrick inasmuch as the Board had not yet computed

the amount of backpay Kendrick (or any other discriminatee) was entitled to receive, if any, as a result of the unfair labor practices.

C. Backpay Proceedings

On September 30, 1991, the Board's Regional Director for Region 29 issued a Backpay Specification and Notice of Hearing alleging that Leone, Cabral and other discriminatees were entitled to backpay for the period commencing April 15, 1983 through March 4, 1991. The backpay period for Kendrick was alleged to run from July 10, 1984 until March 4, 1991.

In August, September and October, 1992, the above "Backpay" matter was heard by Administrative Law Judge James F. Morton (ALJ Morton). As discussed below, Petitioners challenged the application of the *Woolworth* formula (*F.W. Woolworth*, 90 NLRB 289 (1950)) to the Board's computation of Kendrick's backpay. Additionally, Petitioners asserted that the Board erred in failing to limit Leone's and Cabral's backpay as they quit substantially equivalent interim positions without reasonable cause. On February 18, 1993, ALJ Morton issued a Supplemental Decision wherein he ordered Petitioners to pay the full amount of the General Counsel's Backpay Specification, with interest (App. B at 24a). Subsequently, Petitioners filed exceptions to this decision and a brief in support. On November 22, 1993, the Board issued its Supplemental Decision, reported at 313 NLRB 43, affirming the decision of ALJ Morton (App B. at 5a-8a).

On December 8, 1993, a petition for review was docketed in the United States Court of Appeals for the District of Columbia Circuit. On January 11, 1994, Respondent filed a cross-application for enforcement of its order. The parties submitted briefs in support of their respective positions. At oral argument, the Tenth Circuit's recently issued decision, *La Favorita v. NLRB*, 48 F.3d 1232 (10th Cir. 1995) (table decision) and its effect upon

Petitioners' arguments regarding Ralph Kendrick were addressed by Petitioners' and Respondent's attorneys. A copy of the *La Favorita* decision is reprinted, *infra*, as App. E at 95a-100a in the Appendix. Without distinguishing or otherwise mentioning the *La Favorita* decision, the court below denied the petition for review and granted enforcement of the Board's order (App. A at 3a-4a).

Specifically, the court refused to consider the merits of Petitioners' arguments pertaining to Ralph Kendrick. Rather, the court stated the issue of

> whether the calculation of another discriminatee's [*i.e.*, Kendrick] backpay award should be performed pursuant to the traditional *F.W. Woolworth* quarterly formula [was] actually decided by the Second Circuit, and [is], therefore *res judicata. See Glover,* 905 F.2d at 686; *Glover Bottled Gas Corp.*, 292 NLRB 873, 887 (1989).

App. A at 4a.

As discussed below, this holding conflicts with the Tenth Circuit's decision in *La Favorita.* Similarly, the court below, in a terse elliptic manner, dispensed with Petitioners' arguments concerning Leone and Cabral, essentially finding that Petitioners were unable to prove the Board erred in their backpay calculations.[1]

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1. Petitioners are complying with the Circuit Court's judgment in all respects and are limiting their appeal herein to the backpay issues regarding Kendrick, Leone and Cabral.

STATEMENT OF FACTS

Petitioners assert that the following facts support their petition for writ of certiorari:

A. Ralph Kendrick

Following his termination by Petitioner Glover, Kendrick secured employment for most of the backpay period. In the first quarter of 1990, however, Kendrick failed to secure any interim employment.

During the first quarter of 1990, Kendrick claimed that he had spoken to his Union representative about securing work, but that he received no "tips". Kendrick also alleged that he was not referred to any jobs by the New York State Unemployment Insurance Division after registering, and that he reviewed the local newspaper advertisements, but saw none that were attractive. Kendrick testified that he was seeking employment that would add to his retirement and that paid well. As Kendrick noted with regard to job opportunities that appeared in newspapers, "if they say five dollars an hour for someone that's making eighteen you can't take that job." Kendrick did not earn $18 per hour working for Petitioners, nor would he have earned anywhere near $18 per hour working for Petitioners at any time during his backpay period.

Kendrick earned more than $55,000 in 1989; more than $37,000 in 1988; more than $39,000 in 1987; more than $40,000 in 1986; and more than $50,000 in 1985. It is uncontroverted that had he stayed with Petitioners for the same periods, Kendrick's earnings would have been substantially lower, to wit: $34,890.56 in 1989; $29,707.29 in 1988; $29,485.36 in 1987; $28,368.43 in 1986; and $24,830.22 in 1985. *Thus, Kendrick earned approximately $73,000 more after he was terminated than he*

would have had he remained in Petitioners' employ. In light of Kendrick's failure to mitigate his damages, the application of *F.W. Woolworth* was erroneously applied and the Board's decision in that regard should not stand.

B. Joseph Leone

Leone was employed by Glover as a route driver. He alleged that his search for interim employment included reviewing advertisements in local newspapers; registering with the New York State Unemployment Insurance Division; and talking to friends.

Leone secured employment with R.T. Gould Metals ("Gould") prior to the start of his backpay period. He drove a truck for one week, delivering metal. During the one week period, Leone earned $603, working approximately 58 hours at $9 per hour, with pay at time and one-half his regular rate for hours over 40. Though Leone alleged that he quit his job at Gould because he was overworked, he also alleged that he worked 55 hours per week for Petitioner Glover. Leone further alleged that he left Gould's employment because the Company violated the Department of Transportation's ("DOT") regulations, but no evidence appears in the record to support this assertion.

In the fourth quarter of 1985, Leone secured employment with Treadways Express, Inc. ("Treadways") as a driver. Leone was paid $11 per hour and he worked between 50 and 55 hours per week. According to the Board's Backpay Specification, Leone would have been earning $9.68 per hour for 48 average adjusted hours at Glover in the fourth quarter of 1985; $9.93 per hour for most of the first quarter of 1986 and $10.18 per hour through the third quarter of 1987.

Leone testified that though he was working full-time for

Treadways in the summer of 1986 and that he had a chance to join the union (and thus secure seniority rights), *he quit to move to Florida in August 1986.* Leone admitted that he had no job prospects when he quit Treadways, and that after two weeks he secured work in Florida at an initial wage of approximately one-half the hourly wage paid by Treadways.

Had Leone not quit his employment with Treadways, he would have, based upon his own testimony, earned $11 per hour for 50 to 55 hours of work per week, or between $605 and $687.50 per week. This computes to between $7,865 and $8,936.50 per quarter. Either figure exceeds the amount the Board claimed Leone would have earned had he been employed by Petitioner during the relevant periods in 1986 and 1987.

The Board and the Court of Appeals erred in ignoring Leone's employment with Treadways. In this regard, the Board erred in concluding that Leone quit and moved to Florida because "business got very slow." (App. B at 6a). The Board further erred in finding that Leone's employment with Treadways was allegedly casual, sporadic and not "comparable" to "Leone's full-time position" with Glover.[2]

C. Robert Cabral

Cabral was employed as a deliveryman by Petitioner Glover prior to the strike. He secured interim employment with

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2. Significantly, ALJ Morton, who had the best opportunity to examine the evidence and witnesses first-hand, never made such a finding in his decision. Moreover, said finding flies in the face of Leone's uncontroverted testimony that he had been employed *full-time* with Treadways months before he left to go to Florida and had an opportunity to secure seniority rights by joining the union at Treadways. At the time Leone left his employment at Treadways, no evidence existed indicating this employment was "casual," "sporadic" and not "comparable" to his former position with Petitioners.

Crestwood Metals Corp. ("Crestwood") in 1984 and worked there steadily until the third quarter of 1987. During his employment with Crestwood, Cabral earned *more* than he would have earned with Petitioners had he been reinstated.

In the third quarter of 1987, Cabral quit his job with Crestwood and took off for a month to visit with his family in Tennessee. Thereafter, Cabral took a job with Big Bee Transportation in Missouri as an over-the-road driver. Cabral testified that the only reason he left Crestwood was that he was interested in giving cross-country driving a try. He did not have the job with Big Bee set up when he quit Crestwood, and apparently got the lead on the job while visiting with his family in Tennessee after he quit Crestwood.

As with Leone, the Board erred in failing to limit Cabral's backpay by his resignation from Crestwood. The Court below also erred in enforcing the Board's order in this regard.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' REFUSAL TO CONSIDER PETITIONERS' ARGUMENTS CONCERNING KENDRICK'S BACKPAY COMPUTATION UNDER THE DOCTRINE OF *RES JUDICATA* IS PATENTLY ERRONEOUS AND SQUARELY CONFLICTS WITH THE TENTH CIRCUIT'S *LA FAVORITA* DECISION AND OTHER DECISIONS.

Rule 10.1(a) of the Supreme Court Rules states that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor," which include, but are not limited to, the situation "[w]hen a United States court of

appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." This is the situation presented herein regarding Ralph Kendrick. The D.C. Circuit Court's decision below herein squarely conflicts with the Tenth Circuit's decision in *La Favorita, supra.* Thus, this petition for a writ of certiorari falls within the parameters of Rule 10.1(a).

Additionally, this case is of paramount importance because of its effect on the doctrine of *res judicata* and its impact upon Board backpay proceedings. As discussed below, the Circuit Court's opinion, if allowed to stand, would provide an unjustified expansion of the doctrine of *res judicata.* Consequently, Petitioners respectfully submit that the need to reconcile this inconsistency among the Circuits, coupled with the paramount importance of this case, warrant granting the petition.

With respect to backpay, the Board currently requires that the amount of backpay be computed under what is known as the *Woolworth* formula. (*F.W. Woolworth Co.*, 90 NLRB 289 (1950)). Prior to *Woolworth,* the Board computed the gross backpay for the period between discharge and reinstatement offer, and then deducted any interim earnings received during this entire period. If the former figure was less than the latter, no backpay was awarded. Since *Woolworth,* such computations are made on a quarterly basis. If backpay exceeds interim earnings for a given quarter, that net backpay figure will be unaffected by the computations in other quarters.

As early as the backpay hearing before ALJ Morton, Petitioners contended that the utilization of the *Woolworth* formula, solely with respect to Kendrick, was punitive in nature. Significantly, the Board's General Counsel, in response to this contention, did not aver that Glover's argument was settled under

the doctrine of *res judicata*. More significantly, in his decision, ALJ Morton did not reject Glover's argument under the doctrine of *res judicata*.

In its brief to the Board in support of its exceptions to ALJ Morton's decision, Glover again argued that the application of the *Woolworth* formula to Kendrick's backpay claim was punitive in nature. As with its brief to ALJ Morton, the General Counsel again did *not* allege that this issue was settled under the *res judicata* doctrine. In its decision, the Board affirmed ALJ's Morton's findings of fact and conclusions of law with respect to Kendrick's backpay claim. It did so without making any specific finding that Glover's arguments were previously settled by the Second Circuit.

In addition to the foregoing history of the backpay portion of this case, the parties *never* raised the *Woolworth* argument before the Second Circuit. The parties *only* litigated the factual and legal issues pertaining to the unfair labor practice charges before the Second Circuit. (App. D at 84a-94a). There was no reason for the parties to raise, or for the Second Circuit to consider, any issues pertaining to Kendrick's, or any other discriminatee's, backpay at that time. In fact, there was no discussion, whatsoever, by the Second Circuit in regard to the application of the *Woolworth* formula to Kendrick's backpay. It was not until the Board submitted its appellate brief to the D.C. Circuit Court that the doctrine of *res judicata* was first mentioned in this action. As in the instant action, the employer in *La Favorita* challenged, *inter alia*, the application of the *Woolworth* formula to the Board's backpay award of $18,458.37 (an amount significantly less than Kendrick's total backpay award) to two discriminatees. In *La Favorita*, the Tenth Circuit noted its earlier opinion wherein it enforced the Board's decision finding *La Favorita* committed unfair labor practices and ordering it to reinstate two former

employees with backpay calculated pursuant to *F.W. Woolworth.*[3] In the supplemental proceedings of that case, La Favorita first challenged the application of the *Woolworth* formula. The Tenth Circuit held, in pertinent part,

> (t)he applicability of the *F.W. Woolworth* formula was not raised in the earlier enforcement proceedings before this court, and we did not addresss it. However, no authority has been cited that would foreclose La Favorita from challenging use of the formula in this proceeding because it failed to raise it in the previous enforcement proceedings.

(App. E, at 97a). Ultimately, the Tenth Circuit enforced the Board's decision in *La Favorita,* but not under the principle of *res judicata.* In any event, the Tenth Circuit's holding is wholly contrary to the D.C. Circuit Court's decision in the instant action.

In *Seattle Seahawks v. NLRB,* 984 F.2d 479 (D.C. Cir. 1993) the Court of Appeals for the D.C. Circuit did not address the propriety of the application of the *Woolworth f*ormula to professional football because the employer had failed to challenge its application. Thus, the Circuit Court, by implication, indicated that it would have considered the appropriateness of the *Woolworth* formula to that particular set of facts. Significantly, the Circuit Court did not find the employer was barred from making this argument under the doctrine of *res judicata* (as it did in the instant action) even though the underlying unfair labor practice case (*Seattle Seahawks,* 292 NLRB 899, 931-932

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3. As in the instant action, the Board in the *La Favorita,* (302 NLRB 849, 854 (1991), *enf'd,* 963 F.2d 382 (10th Cir. 1992)) unfair labor practice decision also ordered that the discriminatees' backpay be computed under the *Woolworth* formula.

(1989)) specifically provided that the discriminatees' backpay was to be calculated in accordance with the *Woolworth* formula. This result is squarely in conflict with the Circuit Court's decision in the instant matter. Accordingly, this discrepancy within the D.C. Circuit further warrants the granting of the petition in this action.

Moreover, the D.C. Circuit's decision is contrary to a plethora of cases from this Court and the other Circuits regarding the doctrine of *res judicata*. A valid and final judgment on the merits is treated as conclusive as to the parties' rights and accorded binding effect in all subsequent lawsuits involving the same cause of action, claim or assertion. *Cromwell v. County of Sac*, 94 U.S. 351 (1876). Thus, in order for a judgment to be given former adjudication effect, a court must find that it meets three requirements. The judgment must be valid, final and on the merits. Petitioners assert the issue of the *Woolworth* formula's application upon Kendrick's backpay was neither final nor on the merits. As discussed above, under Board law, the determination of Kendrick's backpay would be made at a supplemental proceeding. A judgment determining liability will not be sufficiently "final" for *res judicata* purposes as long as damage issues are deferred for separate trial or otherwise remain unadjudicated. *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22 (1916).[4]

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4. Similarly in *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 801-803 (1949), an indictment was dismissed because women had been intentionally excluded from the grand jury. Thereafter, the Court ordered that materials produced in response to a subpoena be returned, and restrained the government from using any knowledge gathered from the papers. This last order was held not to preclude the government from demanding production of the same papers in connection with later proceedings, primarily on the ground that the order was intended to wind up the original proceeding and was not intended to affect the questions presented by the later proceeding. *See also, Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) in support.

Moreover, the requirement that a judgment be on the "merits" to have full *res judicata* effect accords with the modern procedural concept that a claimant is entitled to a day in court and that he should not lose the right to a hearing on the substance of his assertion because of procedural technicalities. *See Montana v. United States,* 440 U.S. 147, 153-154 (1979). As detailed above, backpay issues, such as the application of the *Woolworth* formula, were not addressed in the unfair labor practice proceedings before the Board and the Second Circuit (App. C and App. D). It was not until the "supplemental" proceedings did Petitioners have their "day in court". Regrettably, this right was taken away by the D.C. Circuit Court upon the erroneous belief that this issue was decided by the Second Circuit. Nothing can be further from the truth.

Based on the foregoing, the D.C. Circuit Court's decision, if allowed to stand, will seriously undermine the employer's (and union's) rights to contest backpay claims unless they are first raised in the unfair labor practice proceedings. This will pose an unnecessary burden upon the litigants, the Board and the Courts themselves who principally must determine whether unfair labor practices had, in fact, occurred. Accordingly, it would be wholly implausible for the parties to present evidence, subpoena witnesses, and submit briefs on backpay issues at the unfair labor practice stage of Board litigation.

Petitioners assert that had the D.C. Circuit Court considered its Kendrick argument, *on the merits,* Petitioners could have limited Kendrick's backpay.

This Court in *NLRB v. Seven-Up Bottling Co. of Miami,* 344 U.S. 344 (1953), indicated that the Board should *not* apply *F.W. Woolworth* "without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *Seven-Up Bottling,* 344 U.S. at 349.

The Third Circuit Court of Appeals, in *Systems Management v. NLRB*, 901 F.2d 297 (3d Cir. 1990) denying enforcement, in part, of a Board order in *Systems Management*, 292 NLRB 1075, pointed out that a Board order may not substitute punitive measures for compensatory damages and that "orders may not be punitive or confiscatory and must be reasonably adapted to the situation that calls for redress."[5] In the underlying case, the Board had ordered an award based upon a union contract which the court found was not breached, therefore providing no basis "which would entitle [the employees] to compensatory damages," let alone the windfall damages which would ensue from such an award.[6]

In the instant matter, Kendrick secured regular employment immediately upon his termination in 1984. To say this employment was "substantially equivalent" to the position he held or would have held at Petitioners but for his termination is to understate the obvious by half. Over the next five years, Kendrick earned $221,000 at his "interim" employers. He would have earned $147,000 had he worked with Petitioners. Except for the first quarter of 1990, Kendrick earned more at his interim employment thereafter and until he was offered reinstatement in March, 1991 than he would have earned at Petitioners. During the first quarter of 1990, Kendrick did not deign to seek employment with any employer that did not offer wages or retirement benefits comparable to those he had become accustomed to during the period of his "interim" employment, a level of wages far and above the level he would have achieved had he remained employed by Petitioners.

In view of the above, it is clear that the Board's award of an

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5. *Systems Management v. NLRB, supra,* at p. 2009. *NLRB v. Townhouse T.V. and Appliances, Inc.*, 531 F.2d 826, 830 (3d Cir. 1978).

6. *Systems Management v. NLRB, supra,* at p. 2009.

additional $13,878.38 plus interest, did not effectuate any policy or purpose related to the Act. Such an award, on top of the more than $81,000 difference between Kendrick's interim earnings and his gross backpay for the backpay period, would represent an unwarranted windfall clearly in excess of any compensatory award contemplated by the Act.

Moreover, the instant situation with Kendrick is inapposite to the reasoning behind the Board's adoption of the quarterly basis for computing backpay. Prior to *F.W. Woolworth*, backpay was computed on the basis of the employee's gross wages less interim earnings during the entire backpay period. Employees could conceivably lose all of their backpay entitlement if, over time, they secured higher paying jobs, with the higher interim earnings offsetting losses during the early part of the backpay period. As a result of this anomaly, the Board found that discriminatees were waiving reinstatement early in the backpay period in order to lock in their losses and thus the employer's liability. This, the Board concluded, did not effectuate the remedial goal of the statute which called for discriminatees to be reinstated. This situation, however, did *not* exist as to Ralph Kendrick, who earned far more with his interim employers since the commencement of his backpay period.

It is submitted that a *per se* application of the *Woolworth* formula to the instant case is inapposite to the purpose of the Act. By way of analogy, under Title VII of the Civil Rights Act as well as other federal statutes, courts will not award backpay to a plaintiff who obtains an interim job that pays as much as or more than the job he/she was denied for discriminatory reasons, inasmuch as the plaintiff has experienced no loss of income as a result of the discrimination. *Kinsey v. Legg Mason Wood Walker*, 23 F.E.P. 770 (D.D.C. 1978), *aff'd*, 605 F.2d 572 (D.C. Cir. 1979). (The amount recovered by the plaintiff as backpay was reduced by the salary he earned upon taking a similar job after being denied employment with the defendant. If that salary was found

to be greater than that which he would have earned with defendant, the period of backpay was to end when he began that job.) *See also, Cowan v. Prudential Ins. Co. of Am.*, 852 F.2d 688 (2d Cir. 1988). (The court affirmed the denial of backpay, calculating that the Plaintiff would have earned more had he continued as an agent, than he would had he received the promotion to sales manager, as the latter position was paid to a minimum draw for the first two years, while agents were paid solely by commission.)

In the instant case, this rationale for a quarterly computation did not exist. Kendrick immediately secured employment in which he earned substantially more than he would have with Petitioners. Kendrick continued to earn substantially more for five years, accumulating during that period a sum in excess of $80,000 more than he would have earned with Petitioners. It was only in the first quarter of 1990, almost six years after his termination, that for three months he did not secure employment. Thereafter, he again secured employment at a rate higher than he would have had with Petitioners. This fact pattern only serves to emphasize the distinction between Kendrick's situation and the *Woolworth* rationale. It further emphasizes the windfall nature of any award to Kendrick, a circumstance not contemplated by the *Woolworth* Board or the compensatory scheme of the Act.

II.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED INASMUCH AS THE COURT OF APPEALS' ENFORCEMENT OF THE BOARD'S ORDER REGARDING LEONE'S AND CABRAL'S BACKPAY PAY IS CONTRARY TO APPLICABLE LAW.

Petitioners assert the D.C. Circuit Court's decision pertaining to Leone and Cabral squarely conflicts with decisions of other Circuits.

In *NLRB v. Hopcroft Art & Stained Glass Works*, 692 F.2d 63 (8th Cir. 1982), the Court of Appeals modified a backpay award by disallowing that period of time after an employee voluntarily resigned from an interim employer. The employee explained that he quit this job for "personal problems" with his neighbor who was also a manager of the interim employer. 692 F.2d at 64. *See also, NLRB v. Aycock*, 377 F.2d 81, 85 (5th Cir. 1967) ("[a] discriminatee should not be able to leave such interim employment for any reason which comes into his head and be assured, as the Board would assure him, that he will not thereby incur any financial loss.") The effect of an unjustified quit was discussed in *Gary Aircraft Corp.*, 211 NLRB 554 (1974), which explained that the amount the employee would have earned had he not quit is to be offset by the remainder of the backpay period. *NLRB v. Hopcroft Art Stained Glass, supra.*

In *Knickerbocker Plastic Co., Inc.*, 132 NLRB 1209, 1212 (1961), the Board noted that persons who incur willful losses in interim earnings by quitting certain jobs must do so with compelling or justifying means:

> When an individual quits suitable interim employment without justification, the individual will be deprived of so much of his backpay claim "as he would have earned had he retained ... the interim job", *Mastro Plastics Corp.*, 136 NLRB 1342, 1350 (1962).

See, in support, Florida Steel Corp., 234 NLRB 1089, 1092 (1978) and *Gary Aircraft Corp., supra.* The *Knickerbocker* rule has been applied in a number of recent Board decisions. In *City Disposal Systems, Inc.*, 290 NLRB 413 (1988), the Board found unjustified a resignation based upon the refusal of an interim employer to give a raise to a discriminatee. 290 NLRB at 418-

419. In *KSLM-AM & KSD-FM*, 275 NLRB 1342 (1985), the Board denied backpay to an employee who quit his interim employment to move out of state.

The foregoing Board decisions have been uniformly enforced by the Circuits. In *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966), the D.C. Circuit Court refused to enforce the Board's backpay order because the discriminatee had removed himself from the labor market by moving to Seattle to be with his daughter. The Circuit Court noted that the discriminatee admitted going to Seattle because he wanted to be near his daughter. 365 F.2d at 891.

As discussed below, application of Circuit and Board precedent to the instant matter leads to the conclusion that the Board erred by failing to reduce the backpay claims of Leone and Cabral. Thus, the D.C. Circuit's "rubber stamping" of the Board's decision was also erroneous. Most significantly, the D.C. Circuit's "rubber stamping" of the Leone and Cabral backpay computations creates conflicts with other circuits.

A. Joseph Leone

Leone testified that he quit Gould because he was grossly overworked. The basis for this claim was a single trip Leone made to Massachusetts during the week. However, based upon his own testimony, Leone worked substantially the same amount of overtime while employed by Petitioner Glover prior to the strike as he worked at Gould during the single week of his employment. *See McCann Steel Co.*, 239 NLRB 1302 (1979), citing *McCann Steel Co. v. NLRB*, 570 F.2d 652, 655 (6th Cir. 1978). Further, other than the overtime hours involved, Leone did not claim the work performed for Gould was physically more demanding or otherwise different from the driving he did for Petitioners.

In August 1986, when Leone quit his job at Treadways he was earning $11 per hour and working ten to fifteen hours of overtime a week. He did not allege or even suggest the work was onerous or physically demanding, nor did he allege that he was "grossly overworked." Leone testified that he *quit to move to Florida to make a better life for his family at a time when he had no job prospects lined up in Florida.*

Thus, the Board erred for numerous reasons in ignoring Leone's employment with Treadways. In this regard, the Board erred in concluding that Leone quit and moved to Florida because "business got very slow". (App. B at 6a). This finding is in direct contrast to Leone's own testimony on the reason he left Treadways in 1986. Thus, the record evidence indicated that Leone quit two (2) jobs during the backpay period, one with Gould, allegedly due to Gould's violation of DOT rules, and one with Treadways *because he wanted a new life for his family in Florida.* With regard to the first quit, the record was devoid of any evidence Gould violated DOT rules. With regard to the second quit, the record established that Leone was earning more with Treadways than he would have earned working for Petitioner Glover and that he quit for non-compelling reasons without any prospect for future employment in Florida.

B. Robert Cabral

Cabral secured employment with Crestwood in 1984, prior to the commencement of his backpay claim period. Based upon the Backpay Specification, this position paid more than Cabral would have earned had he been reinstated to his position with Petitioner Glover. Cabral offered no testimony to indicate the position with Crestwood was more onerous or more physically demanding than the position held formerly with Petitioner. To the contrary, Cabral testified that his position with Crestwood was similar to his work at Petitioner Glover. Further, Cabral

eventually returned to his job at Crestwood, a circumstance that is indicative of the desirable nature of the position.

Cabral quit his position with Crestwood because he was interested in giving cross-country driving a try. He did not, however, have a job lined up with his subsequent employer, Big Bee Transportation, when he quit Crestwood. In fact, he did not even seek immediate employment with his subsequent employer, Big Bee, after quitting. Instead Cabral took off for a month to visit with his family in Tennessee. The Board's conclusion that Cabral left Crestwood "to work as a cross country driver for Big Bee" (App. B at 7a) flies in the face of Cabral's testimony. Based upon the above, Petitioners contend that Cabral's claim for backpay after he quit Crestwood in 1987 and before he returned to Crestwood in 1988 should have been offset by the amount he would have earned had he not quit. As Cabral was earning more at Crestwood during the first two (2) quarters of 1987 than he would have earned had he been reinstated by Petitioners, the D.C. Circuit Court should have concluded that Cabral was not entitled to backpay. Thus, the D.C. Circuit Court should have denied the Board's cross-application to enforce its backpay order as it related to Leone and Cabral.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the writ should be granted.

Respectfully submitted,

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APPENDIX A — UNITED STATES COURT OF APPEALS JUDGMENT DATED AND FILED MARCH 3, 1995 WITH ATTACHED OPINION DATED MARCH 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1831

Glover Bottled Gas Corp., Vogel's Inc., New York Propane Corp., Synergy Gas Corp., and Synergy Group, Inc.,

Petitioners,

v.

National Labor Relations Board

Respondent

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE: Wald, Silberman and Tatel, Circuit Judges

JUDGMENT

These causes came on to be heard on the petition for review and cross-application for enforcement of an order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is denied and the cross-application for enforcement is

granted, in accordance with the Opinion of the Court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 3, 1995 Decided March 3, 1995

No. 93-1831

GLOVER BOTTLED GAS CORP., VOGEL'S INC., NEW YORK PROPANE CORP., SYNERGY GAS CORP., AND SYNERGY GROUP, INC.,

PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT

Appeal from the National Labor Relations Board
and Cross-Application for Enforcement

Clifford P. Chaiet argued the cause for petitioners.

Vincent J. Falvo, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Linda Sher,* Acting Associate General Counsel, *Aileen A. Armstrong,* Deputy Associate General Counsel, and *Peter Winkler,* Supervising Attorney, National Labor Relations Board.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A

Before: WALD, SILBERMAN, and TATEL, *Circuit Judges.*

Opinion for the Court filed *PER CURIAM.*

PER CURIAM: This petition essentially presents factual issues arising out of a National Labor Relations Board back pay proceeding, which tend to be heavily fact bound. The Board's order, determining that the employer engaged in unfair labor practices, has already been enforced by the Second Circuit, *NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681, 683 (2d Cir. 1990) (the employer's facility is in New York). The employer was held to have, *inter alia,* treated returning strikers as new employees, withheld benefits, refused to bargain with the union, and engaged in retaliatory discharge against union members. Two of the issues raised before us — whether petitioner had made bona fide offers of reinstatement to two discriminatees Leone and Cabral through questionnaires of availability and whether the calculation of another discriminatee's back pay award should be performed pursuant to the traditional *F.W. Woolworth* quarterly formula — were actually decided by the Second Circuit, and are, therefore, *res judicata. See Glover,* 905 F.2d at 686; *Glover Bottled Gas Corp.*, 292 N.L.R.B. 873, 887 (1989). None of the rest of the factual issues come close to raising a legal question (substantial evidence on the whole record), and we therefore wonder why the employer would bring his second petition to either court of appeals. Perhaps the interest rate the Board employs to calculate back pay is too low.

For the foregoing reasons, the petition is therefore denied, and the Board's cross-application for enforcement is granted.

So ordered.

APPENDIX B — DECISION OF THE NATIONAL LABOR RELATIONS BOARD, *GLOVER BOTTLED GAS CORP.*, 313 NLRB 43 (1993)

Glover Bottled Gas Corp.; Vogel's, Inc.; New York Propane Corp.; Synergy Gas Corp.; Synergy Group, Inc. ***and*** **Ralph Kendrick**

Glover Bottled Gas Corp.; Vogel's, Inc.; New York Propane Corp.; Synergy Gas Corp.; Synergy Group, Inc. ***and*** **Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.** Cases 29-CA-11302, 29-CA-10641, 29-CA10763-1, 29-CA-10763-2, 29-CA-10795-1, 29CA-10795-2, and 29-CA-12653

November 22, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 18, 1993, Administrative Law Judge James F. Morton issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

Appendix B

1. The Respondent has excepted to, among other things, the backpay award to Joseph Leone. The Respondent contends that Leone was not justified in quitting his job at Treadways Express and any backpay should end in August 1986.

Leone had worked at Sinkoff Beverage from late 1983 through late 1985. In late 1985 he began working as a truckdriver on a casual basis for Treadways Express. In the winter when work slowed down at Treadways, Leone took a job as a temporary employee with Career Temporary Force. He did temporary work for several months and then went back to Treadways, where he continued to do casual, fill-in driving. In the spring and summer of 1986 Treadways had enough work to keep Leone busy full time. In August 1986 Leone moved to Florida "to make a better life" for his family.[1]

As noted by the judge, a discriminatee who, without good cause, quits a comparable job with an interim employer has thereby incurred a willful loss of earnings, warranting a reduction in backpay. *Shell Oil Co.*, 218 NLRB 87 (1975). A discriminatee, however, is under no obligation to retain nonequivalent employment. *Newport News Shipbuilding Co.*, 278 NLRB 1030 (1986). During those periods when Treadways needed Leone's services, he worked many hours and had earnings comparable to those he had had at the Respondent. When work at Treadways was slow, as it often was however, Leone was forced to seek temporary employment. We are not persuaded that the casual, sporadic Treadways Express job was comparable to Leone's full-time position with the Respondent. As we have determined that Leone's job with Treadways was not equivalent to his job at

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1. The judge inadvertently stated that the job Leone left when he moved to Florida was with Sinkoff Beverage. In fact, Leone left the job with Treadways Express. This does not affect the result.

Glover, we conclude that when he left the Treadways job to seek employment and better opportunities in Florida, he did not incur a willful loss of interim earnings. *Florida Steel Corp.*, 234 NLRB 1089 (1978).[2] We note, in addition, that Leone secured employment within 2 weeks of his arrival in Florida and has now been with that same employer for the past 6 years.

2. Former striker Robert Cabral left his job at Crestwood Metals in late 1987 to begin work as a cross-country truckdriver for Big Bee Transportation. Before Cabral began his new job, he took a 1-month vacation. The judge concluded that Cabral's vacation at Crestwood Metals was roughly equivalent to the vacation he would have earned at the Respondent, in the absence of the Respondent's discrimination. Our analysis of the record reveals, however, that the judge was in error in computing Cabral's vacation time at the Respondent. Thus, in February 1983 when Cabral went on strike, he would only have been entitled to 3 weeks' vacation. As a result, we find that his backpay should be reduced by 1 week in the third quarter of 1987.[3]

ORDER

The Respondent, Glover Bottled Gas Corp., Patchogue, New York; Vogel's, Inc., Farmingdale, New York; New York Propane Corp., Farmingdale, New York; Synergy Gas Corp., Deer Park,

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2. See also *Rice Lake Creamery Co.*, 151 NLRB 1113 (1965) (discriminatee entitled to backpay after moving from Wisconsin to Washington "for personal reasons" and because he believed the employment opportunities would be better there).

3. As we cannot determine from the record before us what the amount of the reduction should be, we leave those computations to further compliance proceedings.

Appendix B

New York; and Synergy Group, Inc., Farmingdale, New York, its officers, agents, successors, and assigns, shall take the action and pay the amounts set forth in the judge's Order.[4]

4. Less the 1 week's vacation pay for Robert Cabral, as discussed, supra.

Appendix B

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. Backpay totaling $132,701.92[1] plus interest on a quarterly basis is sought from the Respondent to make whole 10 employees who had been unlawfully denied reinstatement to their jobs and also another employee who was later unlawfully discharged, as found in the decision of the Board, reported at 292 NLRB 873 (1989). The Respondent contends that it is liable for substantially less, based on various grounds, discussed below.

I heard this backpay matter in Brooklyn, New York, on 5 days, beginning on August 3, 1992, and ending on October 8, 1992. On the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

A. *Background*

Fifteen of the Respondent's employees took part in an economic strike which began on February 3, 1983. On April 15, of that year, an unconditional offer to return to work was made on their behalf to the Respondent. By then, the Respondent had hired 11 replacements. There were thus openings for four jobs. None of the strikers were recalled at that time. The Board adopted the

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1. The amounts sought in the backpay specification had been revised during the course of the hearing. The last revision is set out in G.C. Exh. 18.

administrative law judge's finding that the Respondent had, as of April 15,1983, unlawfully failed to reinstate those 4 of the 15 striking employees who had the most seniority. The Board also held that, as nine other positions had become available after April 15 to permit the Respondent to reinstate others, the Respondent's failure to offer reinstatement to these other strikers was unlawful. Another employee, Ralph Kendrick, was found to have been unlawfully discharged on July 10, 1984.

B. *The Gross Backpay Formula for the Striking Employees*

The amended backpay specification states, in substance, that an appropriate measure of the gross backpay for the strikers and also for the other discriminatee, for whom backpay is sought on a quarterly basis in their respective backpay periods, is the average weekly hours, regular and overtime, they worked while on the Respondent's payroll, multiplied by their wage rates as of the start of the strike, together with increases to the rates which were given to employees after April 15, 1983.

The answer filed by the Respondent admits that the formula is appropriate.[2]

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2. The Respondent, at the hearing, stated that there is a question as to how much overtime work would have been available for all strikers had they been reinstated properly. It argued that the Respondent "was able to operate with just 11 people." The appropriate formula, as set out in the pleadings, is not based on the hours worked by the replacements but on the hours the discriminatees worked prior to the strike. If the Respondent was endeavoring to contest the appropriateness of tbe formula, it has not proposed a different one. Further, as noted in the underlying case, employees of companies affiliated with the Respondent performed work for the Respondent during the backpay period. The Respondent argued then, as reflected at page 877, that it "is impossible to determine" whether one of these employees worked considerable overtime for it. There is no basis for me to

(Cont'd)

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C. *The Backpay Periods for the Former Strikers*

1. Their seniority status

Backpay is sought for 10 former strikers,[3] named below according to their seniority status with the Respondent:

Gary Estes	Robset Zak
Harry Serres	William Jones
Richard Dean	Joseph Leone
David Wahlfield	Thomas Clark
Stanley Wnenta	Robert Cabral

2. The respective starting dates of the backpay periods of these 10 employees

For the reason noted above, the first four of their former strikers should have been reinstated on April 15, 1983. Their backpay is to be calculated beginning on that date.

There is an issue as to when the remaining six should have been reinstated. General Counsel contends that the next senior individual, Stanley Wnenta, should have been reinstated in July 1983 when the Respondent, instead, engaged Robert Bradley as a

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(Cont'd)
disregard the backpay formula as established in the pleadings, one that has been long accepted as an appropriate measure for determming gross backpay for discriminatees. See *Honda of Mineola,* 303 NLRB 676 (1991), and *F & W Oldsmobile,* 272 NLRB 1150 (1984).

3. The original backpay specification named two other former strikers, Raymond Frey and Nickolas Kahn. As no backpay is due them, their names have been deleted from the specification.

route driver, as noted in the underlying decision at page 876. The Respondent contends that Bradley replaced another unit employee who had not participated in the strike and that Bradley was not a striker replacement. The Board, however, has found to the contrary and that determination is binding here. The Board adopted the finding that a position had become available in August and September 1983 when Bradley was assigned bargain unit work. Thus, Wnenta's backpay period began with the third quarter of 1983.[4]

As to the next senior former striker, Robert Zak, the General Counsel contends that his backpay period began on August 20, 1983, when a replacement, Karlin, left the Respondent's employ. In the underlying decision, it was found that a position became available then for the next senior former striker. Accordingly, Zak's backpay period began on August 20, 1983.

The next job opening occurred on September 20, 1983, when a replacement, Krol, quit. That date starts the backpay period for William Jones.

The backpay period of Joseph Leone begins on November 15, 1983, when a replacement, Pinto, quit.

The backpay period for Thomas Clark began on June 1, 1984, when another replacement quit.

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4. The Respondent argued that Bradley worked on a temporary basis and that he was not a permanent replacement. At best, that contention might pertain to a possibility that Wnenta's backpay period would have ended prior to the date on which the Respondent ultimately did offer him reinstatement. Such speculation is no reason to ignore the Board's finding.

Appendix B

The last of the 10 former strikers, Robert Cabral, should have been hired on July 23, 1984, instead of a replacement, Higgin, who began working there for the Respondent. Cabral's backpay begins to run as of July 23,1984.

3. The ending dates

The Respondent sent a letter on December 14, 1983, to each of the strikers and enclosed with it a questionnaire as described at page 876 of the report of the underlying decision. The Respondent has urged that I find that those letters constituted valid reinstatement offers which terminated the backpay period for all strikers. That contention was considered and rejected by the Board in its adoption of Judge McLeod's decision, as reported on page 877. It is thus without merit. A joint exhibit in evidence sets out the following respective dates on which the former strikers named above either were reinstated or were given valid offers of reinstatement. These dates terminate the respective backpay periods:

Estes—August 1,1983
Serres—October 1,1983
Dean—September 1, 1983
Wahlfield—March 1, 1991
Wnenta—March 1, 1991
Zak—April 23, 1984
Jones—March 4, 1991
Leone—March 4, 1991
Clark—January 25, 1988
Cabral—March 4,1991

Appendix B

D. *The Strike Benefits*

The Respondent contends that the backpay awards sought for the former strikers should be reduced by the approximately $50 a week they each received as strike benefits from the Union.

In *Marlene Industries Corp.*, 234 NLRB 285 (1978), the Board allowed, as an offset to backpay, a union's payment of moneys to a discriminatee whom it had hired to picket the employer in that case during an organizational drive. In *Tubari Ltd.*, 303 NLRB 529 (1991), the Board noted that payments by the union there of $175 a week to each of the discriminatees for picketing from 7:30 a.m. to 3:30 p.m. daily constituted significant compensation for picketing duties and thereby were interim earning deductible from gross backpay. See also *Superior Warehouse Grocers,* 282 NLRB 802 (1987). There the Board distinguished cases that held that strike benefits are not in the nature of pay for interim employment and do not constitute interim earnings. In *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888, 893 (1966), the court affirmed the Board's finding that strike benefits paid to discriminatees based on their performing some picketing were "collateral" to the association the discriminatees there had with their union and thus were not deductible like wages or earnings resulting from interim employment. In *My Store, Inc.*, 181 NLRB 321, 329-330 (1970), strike benefits made pursuant to loans given discriminatees were held not to be interim earnings; other payments made by the union there to the discriminatees were held to be interim earnings as the union filed Federal wage information forms thereon and furnished the payees with related income tax forms. In *Standard Printing Co. of Canton,* 151 NLRB 965, 966 (1965), the Board held that there must be a showing that strike benefits were given only on condition that the discriminatees picket, in order for the benefits to be treated as interim earnings and that a mere requirement that

a discriminatee must sign a strike roll each day, to demonstrate that he is not employed elsewhere to be eligible for benefits, will not convert those benefits into interim earnings. The burden is on the Respondent to prove that the amounts received by the former strikers from the Union were in the nature of pay for interim employment and not strike benefits. See *Sioux Falls Stock Yards* Co., 236 NLRB 543, 549 (1978), and cases cited therein.

These cases looked at the arrangements the unions had made with the striking employees to determine whether or not they effectively spelled out an employment relationship. Thus, if a striker was required to picket and is compensated for the hours he picketed, an employment relationship will be found. Similarly if a union in effect has "hired" a discriminatee to picket, an employment relationship will be found. In both instances, strike benefits paid to those discriminatees are viewed as interim earnings. If however, the evidence establishes that strike benefits to pickets are "collateral" to their union membership or to their activities as a union supporter or where the totality of the circumstances do not otherwise warrant a finding of an employer-employee relationship between a discriminatee and his union, strike benefits are not viewed as interim earnings.

In the case before me, some of the former strikers testified in conclusory form that they were paid for picketing or that they had to picket to receive strike benefits. It does not appear that they were ever told by the Union what the requirements were for them to be eligible for strike benefits. The evidence indicates that each week a list of the employees who went on strike was handed in at the Union's office and the benefits clearly were then given to one of the strikers or to a union business agent for distribution to the strikers. The benefits ultimately came from the Union's International which advised the Union that any arrearages in

union dues by a discriminatee must be deducted from his benefits, that a member must be in good standing to receive benefits and that a member who receives 3 days of work in a week shall not be eligible for "out-of-work benefits for that week." A business agent of the union testified that he believed a striker had only to be "available" for picketing duty to qualify for strike benefits.

I find that the Respondent has not met its burden of proving that a relationship, akin to one of employment, existed vis-a-vis the strikers and the Union. Rather, it appears that the strike benefits were payments which were collateral to the protected activities of the strikers. Accordingly, I reject the Respondent's contention that these benefits are offsets to gross backpay.

E. *The Respective Backpay Claims for the 10 Former Strikers*

The Respondent asserts that the awards sought for four of the former strikers (Estes, Serres, Dean, and Wahlfeld) should be materially reduced based on its contention that they did not mitigate its damages in that they failed to seek employment during their respective backpay periods. The Respondent also asserts that two of the others (Leone and Cabral) should lose backpay as they had quit jobs they held during their backpay periods and also as they had found substantially equivalent employment. These contentions as to these six named former strikers are discussed next.[5]

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5. The Respondent contended that the awards sought for the other four (Wnenta, Zak, Jones, and Clark) should be reduced based on its arguments as to strike benefits and as to the starting dates of their backpay periods. Those arguments have been found, above, to be without merit. Accordingly, I find that the awards sought for those four should be confirmed.

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1. Gary Estes

Estes had worked for the Respondent for 18 years when the strike began in February 1983. He was an installer of propane tanks and a service technician. As the most senior of the strikers, he should have been reinstated on April 15 1983. He was not reinstated until September 1, 1983. He testified that, in that 4-1/2 month interval, he sought work "through the unemployment ." I construe that to mean that he has registered for work referrals at an office of the New York State Department of Labor. He also had filed job applications with companies which delivered propane gas, sought referrals from the Union's hiring hall and searched through newspaper advertisements for jobs in his field.[6]

The case law is clear that the Respondent must prove that a discriminatee willfully failed to seek interim employment. See *Associated Grocers,* 295 NLRB 806, 810 (1989). As noted there, a discriminatee is not held to the highest degree of diligence in seeking interim employment; a discriminatee had but to make reasonable efforts in that regard.

Based on the evidence before me, I find that the Respondent has not met its burden as to Estes. I therefore further find that Estes is entitled to the amount sought for him in the specification, as amended.

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6. The Respondent placed in evidence copies of newspaper job advertisements. It urges that Estes could have been successful in finding work as a truckdriver. Other witnesses have testified that the job market in Long Island was badly depressed. To use the language of Judge Harmatz, in a decision adopted by the Board in an analogous case, the generalized evidence offered by the Respondent is too speculative and imprecise to warrant a reduction in Estes' backpay claim. See *Delta Data Systems Corp.*, 293 NLRB 736, 737-738 (1989).

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2. Harry Serres

Serres began working for the Respondent in 1969 also as an installer. As the second most senior striker, he too should have been recalled on April 15, 1983, the start of his backpay period. He returned to work when recalled on October 1, 1983. In his 5-1/2-month backpay period, he sought work with propane gas companies on Long Island, at the Union's hiring hall and via the unemployment office. He also checked newspaper ads for jobs. For the same reasons noted above as to Estes' claim, I find that the Respondent has not shown a willful failure on Serres' part to seek interim employment. Thus, he is entitled to the award sought for him.

3. Richard Dean

Dean was a bulk truckdriver when he went on strike. His backpay period started on April 15, 1983, and ended on September 1, 1983, when he returned to work for the Respondent. In that interval, he sought work through the employment office, at the Union's hiring hall and by searching for advertisements in Long Island newspapers. As with Estes' and Serres' claim, I find that the Respondent has not shown a willful loss of interim earning by Dean and there conclude that he is entitled to the award sought for him in the backpay specification, as amended.

4. David Wahlfield

Wahlfeld was an installer and serviceman for the Respondent. His backpay period began on April 15,1983. In the third quarter of 1983, he obtained employment with his present employer. No backpay is sought for him after that quarter as his earnings thereafter have exceeded any earnings he would have

received from the Respondent. As with Estes, Serres, and Dean, he had sought employment in mid-1983 by checking newspaper advertisements, by registering at the Union's hiring hall, and with the unemployment office. He testified that he also talked with various persons looking for leads. As noted above, his search proved successful during the third quarter of 1983.

The Respondent has not proved that Wahlfeld willfully failed to seek interim employment. He is entitled to the award sought for him as backpay.

5. Joseph Leone

Leone had worked for the Respondent as a delivery driver. As found above, his backpay period began on September 17, 1983. The amended backpay specification acknowledges that his backpay period ended on March 4, 1991, when the Respondent offered him reinstatement. In that almost 8-year interval, Leone has worked for long periods with two employers one of which is his present employer. No backpay is sought for him in the last 4 of those years as his interim earnings exceeded his gross backpay.

The Respondent quoting excerpts from *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), contends that Leone had secured other regular and substantially equivalent employment during his backpay period and that therefore, his rights to backpay expired. In *Little Rock Airmotive,* 182 NLRB 666 (1970), however, the Board held that *Laidlaw* did not intend that a striker's status be determined by a mechanistic application of the literal language of the statute. See *Christie Electric Corp.,* 284 NLRB 740, 759 (1987), and cases cited therein holding that an employee, who took a job tendered as "permanent" and which paid more than his

job with the struck employer, did not thereby abandon the struck job.

The Respondent has the burden of demonstrating that Leone had abandoned his employment with it as of the time when a job opening for him became available.

The guidelines set out in these cases relate to the evidence before me as to the jobs Leone held during his backpay period. Shortly after it began, he got a job delivering beer for Sinkoff Beverage Co. He was paid per load. In December 1983, as noted above, the Respondent had written all the strikers inquiring as to their availability should the Respondent seek to offer them reinstatement. By then, the Respondent was already 3 months late in offering to reinstate Leone. It argued that its inquiries in December 1983 constituted valid offers of reinstatement to the strikers; that argument was rejected by the Board. The Respondent now cites Leone's response to the inquiry it sent him as evidence that Leone had abandoned his job with it. Leone had responded that he was not interested then in returning to work for the Respondent because he had a job and as the job was paying about the same as he had earned in the Respondent's employ. It is now well settled that, absent an offer of reinstatement, testimony as to subjective intention does not establish a conscious or knowing waiver of the protected right to reinstatement. In that regard, see *Big Three Industrial Gas Co.*, 263 NLRB 1189, 1263 fn. 50 (1982). I find no merit in the Respondent's contention that Leone by working for Sinkoff Beverages, had abandoned his right to reinstatement by the Respondent.

The Respondent separately argues that Leone, by later quitting his job with Sinkoff and, also by having quit a job he held

for a week in the third quarter of 1983, forfeited backpay. He worked for about a week with Gould Inc. as a driver in the third quarter and left because Gould had required him to drive for consecutive hours exceeding DOT safety regulations. He left Sinkoff in 1986 when business got very slow. He moved to Florida then and got steady work in 2 weeks. His earnings after a year on the job, which he has held to the present, exceeded his gross backpay. No backpay after 1987 is sought for him.

A discriminatee who, without good cause, quits a comparable job with an interim employer has thereby incurred a wilful loss of earnings, warranting a reduction in backpay. *Shell Oil Co.*, 218 NLRB 87 (1975). See also *Rainbow Coaches,* 280 NLRB 166, 191 (1986). The evidence before me, however, fails to support the Respondent's claim that Leone, in leaving Gould or Sinkoff, willfully failed to mitigate its damages. It is not unlikely that, had Leone stayed with Sinkoff when its business got slow, his interim earnings would have fallen, possibly resulting in an extended liability for the Respondent. I therefore find no merit in this contention by the Respondent and find, further, that Leone is entitled to the award backpay sought for him.

6. Robert Cabral

The Respondent contends that, during his backpay period, Cabral had employment substantially equivalent to the job he had held with it prior to the strike and that he is therefore not entitled to any backpay. It also asserts that Cabral, in quitting a job during the backpay period, thereby forfeited backpay.

Cabral had worked for the Respondent as a driver, delivering propane gas. His backpay period began on September 1, 1989, and ended 8 years later, in 1991. Backpay for him is sought for

only two quarters, the last two in 1987. In all the other calendar quarters, his interim earnings exceeded his gross backpay.

Cabral got a job, before his backpay period began, with Crestwood Metals Corp as a driver and yard laborer. On the basis and as he was earning more from Crestwood. The Respondent asserts he was therefore employed by Crestwood in substantially the same job that he had with it prior to the strike. Apparently, I am asked to disregard that aspect of his work with Crestwood as a yard laborer and also to assume that all the other terms and conditions of his employment with Crestwood parallel those he had when working for the Respondent. The Respondent carries the burden of proof. I find it has failed in that regard as the evidence is entirely inadequate to sustain its first contention. Further, for the reasons noted above in discussing Leone's claim, I find that the Respondent failed to prove that Cabral had abandoned his job with the Respondent.

As to the record, the evidence is that Cabral left Crestwood in late 1987 to work as a cross-country driver for Big Bee Transportation Co. Before starting his new job, he took a month' s vacation which, as General Counsel has stated, was roughly comparable to the vacation he would have earned, absent the discrimination. His earnings for the last two quarters of 1987 were less than his gross backpay. Thereafter, he received interim earnings higher than his gross backpay. Thus, no backpay for him is sought after 1987.

As noted above, a discriminatee, in quitting equivalent interim employment without good cause, thereby will suffer a reduction in backpay. A discriminatee, however, is under no obligation to retain nonequivalent employment. *Newport News Shipbuilding Co.*, 278 NLRB 1030, 1033 (1986).

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The Respondent has not shown that Cabral's employment with Crestwood was substantially the same as the job he held with it. It cannot now urge that Cabral must, nontheless, have stayed with Crestwood until it, the Respondent, offered to reinstate him—an offer it had unlawfully withheld for 6 years. In these circumstances, Cabral's leaving Crestwood in search of a more desirable job does not constitute a willful loss of interim earnings. *Florida Steel Corp.*, 234 NLRB 1089 (1978). That Cabral in fact had, during his backpay period, exhibited considerable success in obtaining work which materially offset his gross backpay claim forcefully negates any contention that he had willfully failed to mitigate the Respondent's damages.

The award sought for Cabral should be confirmed.

F. Ralph Kendrick's Claim

Kendrick had been unlawfully discharged on July 10, 1984. His backpay period ended on March 4, 1991. The formula used to calculate his gross backpay is the same as that used for the former strikers.

The Respondent contends[7] that any award to Kendrick would be a windfall as his total interim earnings greatly exceeded his total gross backpay. It does not dispute that in 4 of the 27 calendar quarters of his backpay period, he had no earnings to

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7. The Respondent also had stated that Kendrick failed to seek interim employment but it did not pursue that contention further. In any event, the evidence is insufficient to find that, in the quarters during which Hendrich was unemployed, he willfully failed to seek work.

offset the gross backpay due him for each of those quarters. The Respondent's argument addresses the policy set forth by the Board is *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and, in effect, seeks modification of the Board's remedial Order in the instant case, which provided for use of the *Woolworth* formula. I am required to follow that order and thus must reject this contention of the Respondent. Thus, I find that Kendrick is entitled to the award sought for him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Glover Bottled Gas Corp., Vogel's Inc., New York Propane Corp. Synergy Gas Inc. and Synergy Group, Inc., its officers, agents, successors, and assigns, shall pay to the discriminatees whose names appear on Appendix, amended, the quarterly amounts listed for each with interest thereon as provided for in the prior Order of the Board.

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8. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX C — DECISION OF THE BOARD, *GLOVER BOTTLED GAS CORP.*, 292 NLRB 873 (1989)

GLOVER BOTTLED GAS CORP.; VOGEL'S, INC.; NEW YORK PROPANE CORP.; SYNERGY GAS CORP.; SYNERGY GROUP, INC. *and* RALPH KENDRICK *and* LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL-CIO. CASES 29-CA-11302, 29-CA-10641, 29-CA-10763-1, 29-CA-10763-2, 29-CA-10795-1, 29-CA-10795-2 AND 29-CA-12653

February 8, 1989

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Cracraft

On August 26, 1987, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The Respondent filed an answering brief in response to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence

(Cont'd)

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The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by denying bereavement and vacation benefits to returning strikers. In adopting the judge's finding, we have applied the principles articulated in *Texaco, Inc.*, 285 NLRB 241 (1987), for the application of the test as set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). See also *Johns-Manville Sales Corp.*, 289 NLRB 358 (1988).

This test requires that the General Counsel make a prima facie showing of some adverse effect of the denial of benefits on

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(Cont'd)
convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

2. Member Johansen agrees with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by instituting its polygraph policy before the parties reached a good-faith impasse over the issue. However, in so doing, he would not, as did the judge, characterize the Respondent's position on the matter as "so inherently objectionable that it was necessarily designed to frustrate the parties ever reaching agreement on the polygraph issue." See Member Johansen's dissent in *Reichhold Chemicals*, 288 NLRB 69 (1988).

In agreeing with the judge that the allegation concerning the Respondent's withdrawal of recognition is not barred by Sec. 10(b) of the Act, we rely on his finding that, given the context in which Shientag, the Respondent's attorney, expressed his belief that the Union did not represent "the people in the place anymore," his remarks did not rise to the level of a withdrawal of recognition by the Respondent. The Union therefore lacked the clear notice required to start the running of the 10(b) limitation period. We do not rely on the judge's further observation that a withdrawal of recognition at the time Shientag made the remarks would have been unlawful, since the question whether Sec. 10(b) operates to bar an allegation depends on whether the charging party had clear notice of a possible violation more than 6 months before the filing of the charge, not on whether such a charge would or would not have merit.

employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike. Once the General Counsel makes a prima facie showing, the burden, under *Great Dane*, shifts to the employer to come forward with proof of legitimate and substantial business justification for its denial of benefits. The employer may meet this burden by proving, inter alia, that it relied on a nondiscriminatory contract interpretation that is reasonable and arguably correct and thus sufficient to constitute a legitimate and substantial business justification for its conduct. If the employer proves business justification, the Board may nevertheless find a violation if the employer's conduct is demonstrated to be "inherently destructive" of employee rights or motivated by antiunion intent.

Applying these principles here, we find that the General Counsel established a prima facie case. The benefits were accrued and the Respondent admittedly withheld the benefits on the basis of a strike. Further, the Respondent has not met its burden of showing that it denied the benefits based on a legitimate and substantial business justification. We reject the Respondent's contention that the most recently expired contract provided that an employee must work continuously from April 1 to March 31 to be eligible for vacation pay. That interpretation of the contract, essentially for the reasons set forth by the judge, is both unreasonable and not arguably correct. Accordingly, we adopt the judge's finding that the Respondent's withholding of benefits violated Section 8(a)(3) and (1) of the Act.

Given our disposition of this issue, we find it unnecessary to decide whether the Respondent's conduct was inherently destructive of employee rights.

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Glover Bottled Gas Corp., Patchogue, New York; Synergy Gas Corp., Deer Park, New York; Vogel's Inc., Farmingdale, New York; New York Propane Corp., Farmingdale, New York; and Synergy Group, Inc., Farmingdale, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Elias Feuer, Esq., for the General Counsel. *Daniel Shientag, Esq.*, Farmingdale, New York, and *Arthur R. Kaufman, Esq.* (*Kaufman, Frank, Schneider & Rosensweig*), of Melville, New York, for the Respondents.

DECISION

Statement of the Case

PHILIP P. McLEOD, Administrative Law Judge. I heard these cases on 13, 14, 15, and 16 May and 3 and 4 June 1986, and 28 April 1987 in New York, New York. The matter originated from a charge filed in Case 29-CA-10641 on 5 August 1983 by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), against Glover Bottled Gas Corp. and Synergy Group, Inc. A complaint and notice of hearing issued in that case on 30 September 1983. The charges in Cases 29-CA-10763-1 and 29-CA-10763-2 were filed 6 October 1983. The charges in Cases 29-CA-10795-1 and 29-CA-10795-2 were filed 17 October 1983. An order consolidating cases and complaint and notice of hearing issued in those cases on 30 November 1983. All the above-referenced

cases were then consolidated for hearing by order dated 7 February 1984. The hearing in those cases was postponed indefinitely by order dated 21 June 1984.

The charge in Case 29-CA-11302 was filed by Ralph Kendrick on 11 July 1984. A complaint and notice of hearing issued in that case on 24 September 1984. The hearing in that case was later postponed indefinitely by order dated 10 April 1985. On 21 April 1986, all the outstanding cases were consolidated and set for hearing on 13 May 1986. The substantial delays that occurred during the times these cases were postponed indefinitely resulted from protracted litigation between the parties on related issues before the Federal courts and, later, before an arbitrator. This litigation is described in greater detail below.

The charge in Case 29-CA-12653 was filed by the Union on 26 September 1986. A complaint and notice of hearing issued 7 November 1986. On 10 February 1987 the General Counsel moved to reopen the other cases captioned above in which the hearing had already been held and to consolidate them with Case 29-CA-12653. Respondent filed a statement opposing the motion to reopen. On 18 March 1987 I granted the motion of the General Counsel and ordered that further hearing be held, which was done on 28 April 1987.

The parties stipulated that Glover Bottled Gas Corp.; Vogel's Inc.; New York Propane Corp.; Synergy Group, Inc. and Synergy Gas Corp. (Respondent), are a single integrated enterprise and a single employer within the meaning of the Act. The consolidated complaints allege numerous violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations (the Act). They allege that at the conclusion of an economic strike by the employees of

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Glover Bottled Gas Corp., some of the employees were never reinstated to available positions because work was transferred by Respondent between various companies of the single integrated enterprise and because new employees were hired in order to avoid recalling employees who had engaged in the strike. The complaints alleged that those employees who were reinstated were not reinstated to positions that they held prior to the strike, but rather were discriminatorily reinstated to less desirable positions. The consolidated complaints further alleged that such employees were not accorded proper seniority and, as a result, were not assigned as much overtime work as they would have been assigned had their seniority rights been respected. The complaints alleged that Robert Bradley, who was employed by Synergy Gas Corp., was discriminatorily discharged for trying to organize those employees. The complaints alleged that Respondent violated Section 8(a)(5) of the Act by unilaterally changing the health benefits of Glover's employees represented by the Union and by unilaterally instituting a requirement that Glover's employees submit to a lie detector test on demand or Glover's employees who went on strike were discriminatorily denied vacation pay for calendar year 1983 as retribution for having engaged in the strike. Finally, the complaints alleged that Respondent discriminatorily discharged employee Ralph Kendrick because he refused to take the unilaterally imposed lie detector test and further because of Kendrick's participation in a Board hearing conducted on 11 July 1984.

The complaint in Case 29-CA-12653 alleges that Respondent violated Section 8(a)(5) of the Act by not responding to written requests from the Union on 9 April, 1 July, and 8 August 1986 to meet and bargain with the Union as the representative of employees at its Patchogue, New York facility, including drivers,

platform men, and servicemen, and by refusing to furnish the Union with the names and addresses of Respondent's employees employed in these bargaining unit positions.

In its answers to the various complaints, Respondent admitted certain allegations, including the filing and serving of the charges, the status of various entities as employers within the meaning of the Act, the status of the Union as a labor organization within the meaning of the Act, and the status of various individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct that would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, both parties filed timely briefs with me, which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

I. JURISDICTION

Glover Bottled Gas Corp. is a New York corporation with its principal office and place of business in Patchogue, New York, where it is engaged in the sale and distribution of propane gas and related products. Synergy Gas Corp. is a New York corporation with an office and principal place of business in Deer Park, New

York, where it, too, is engaged in the sale and distribution of propane gas and related products. Vogel's, Inc. is a New York corporation with its principal office and place of business in Farmingdale, New York, where it is engaged in the distribution of forklifts and other material handling equipment. New York Propane is a New York corporation with its principal office and place of business in Farmingdale, New York, where it is engaged in the wholesale and retail fuel conversion of motor vehicles. Synergy Group, Inc. is a New York corporation with its principle office and place of business located in Farmingdale, New York. It serves as the parent corporation of Glover Bottled Gas Corp.; Vogel's, Inc.; New York Propane Corp.; and Synergy Gas Corp. As indicated, the parties have stipulated that these entities comprise a single, integrated enterprise and a single employer within the meaning of the Act. During the past calendar year, which period is representative of all times material, these entities have individually and collectively purchased and caused to be transported and delivered to its New York facilities propane gas and other goods and materials valued in excess of $50,000, which were transported and delivered in interstate commerce directly from States other than New York. Respondent admits that these entities are engaged in interstate commerce within the meaning of the Act.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATIONS

Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

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III. THE UNFAIR LABOR PRACTICES

A. *Background*

Glover Bottled Gas Corp. and the Union were parties to two successive collective-bargaining agreements from 1976 to 1979 and from 1979 to 1982 covering all drivers, platform men and servicemen employed at the Glover facility in Patchogue, New York. The most recent collective-bargaining agreement expired on 31 July 1982.

Between 1 August 1982 and 2 February 1983, Glover and the Union held several bargaining sessions, but were unable to reach the terms of a new agreement. On 3 February 1983 Glover employees represented by the Union commenced an economic strike. Positions of the parties remained far apart throughout negotiations. In the most recent agreement, the starting rate for new employees was $3.75 per hour. In contract negotiations. The Union demanded a starting rate of $6.50. At the meeting on 2 February just prior to the commencement of the strike, the Union was still demanding a starting rate of $6 per hour.

At the beginning of negotiations, the Union demanded a $3-per-hour journeyman raise from $8.05 to $11.05. On 28 October the Union reduced its demand for an hourly increase to $2 per hour, and on 2 February the Union still demanded an hourly rate increase of $1.50 per hour. Throughout most of the negotiations, Glover offered an hourly rate increase of 25 cents per hour in 1982, 12-1/2 cents per hour in 1983, and 12-1/2 cents per hour in 1984. The Union demanded an increase in employer pension contributions from $1.51 per hour per employee to $1.95 per hour per employee. At the same time, Glover demanded that employees be removed from the Union's pension plan and

instead be covered by a company profit-sharing plan. Throughout negotiations, Glover proposed/demanded a contractual provision regarding overtime, which provided "Overtime assignments shall be rotated among the employees equitably and without regard to seniority." The Union was unwilling to accept such a provision, insisting that overtime be offered to employees on the basis of seniority.

In a final offer on 10 January 1983, Glover offered substantially the same terms described above. It offered an immediate wage increase from $8.05 per hour to $8.30. It offered wage rates during 1983 of $8.42-1/2 per hour and during 1984 of $8.55 per hour. The management-rights clause contained in Glover's final offer was extremely broad. There is no indication, however, that this clause played a major role in the parties being unable to reach agreement. Rather, the parties remained far apart on other issues, which resulted in the management-right clause being of no particular significance. Respondent's final offer was rejected by the union, and a strike began on 3 February 1983. When the strike began, both parties suspended negotiations indefinitely.

All but one of the unit employees participated in the strike. Only employee Joseph Schumpf continued to work. On 7 February 1983 Schumpf was granted a raise from $8 per hour to $9.35 per hour, far in excess of what Glover was offering the Union.

While the strike was in progress, Glover hired 11 permanent replacements, including Joseph DeFarlo, serviceman and installer; Walter Denton, bulk driver; Donald Gonforone, installer; Phillip Karlin, yardman, Lawrence Krol, installer; Kevin McKeever, bulk driver; Juan Obelar, Jr., bulk driver;

Robert Pinto, serviceman; Philippe Schutt, mechanic's helper; Robert Vanhulsent, bulk driver; and Charles Visser, bulk driver and installer.

By mailgram dated 15 April 1983, and received by Glover on 18 April, the Union made an unconditional offer to return to work on behalf of all striking employees.

B. *The Failure to Reinstate Strikers*

Fifteen bargaining unit employees participated in the strike, which began on 3 February. Respondent hired 11 permanent replacements between the beginning of the strike and the Union's unconditional offer to return to work. Therefore, at the conclusion of the strike, four positions were unfilled, which should have been made available to strikers unless such work had become unavailable.

Respondent carries the burden of establishing that work was unavailable. Respondent, however, does not offer specific proof on this issue, and the available evidence tends to support the contrary conclusion, i.e., that work was available to which employees could have been assigned. Employee Gary Estes testified that after he was finally reinstated in July 1983, he observed a "shoe box full of orders" that he estimated would take a person 8 to 9 months to complete. Although I have the distinct impression that Estes might be exaggerating somewhat about the number of orders, Branch Manager Bittner admitted there was a backlog in pickup orders that had developed as a result of the strike. Both prior to and after the Union's unconditional offer to return to work, employees Ralph Kendrick, Estes, and Richard Dean observed two employees of New York Propane, Alvaro Avila and William Ruthig, performing "pick-ups" and bulk

deliveries to customers of Glover. Finally, Kendrick also observed drivers of Synergy performing bulk deliveries to Glover accounts for an extended period after the Union's unconditional offer to return to work.

Respondent counters the General Counsel's evidence by noting that the operations of Synergy at Deer Park and Glover at Patchogue were merged and that Respondent advised the Union of this fact by letter. I note, however, it was not until 19 September 1983 that Respondent advised the Union of a decision to merge Synergy and Glover. Accordingly, I find that this merger does not account for Respondent's failure to reinstate the employees when the Union offered to return to work 5 months earlier in April. The record also contains more specific evidence that Respondent failed to recall striking employees when work was available. Permanent replacement Philippe Schutt, a mechanic's helper, terminated his employment during the payroll period ending 25 June 1983. Schutt was not replaced. Permanent replacement Phillip Karlin, who worked as a yardman, terminated his employment with Glover during the payroll period ending 20 August. Striker Richard Dean was reinstated on 1 September 1983 and assigned yard work for approximately 1 month before being returned to normal duties, which he had performed prior to the strike. During the week ending 3 September, however, employee Alvaro Avila was permanently transferred from New York Propane to Glover as a bulk driver, the same position held by Dean. This position was not offered to Dean, nor to other striking employees who had worked as bulk drivers prior to the strike. Respondent argues that because Avila was issued a W-2 Wage and Tax Statement for 1983 from Glover showing wages of approximately $25,000, that Avila must have been working at Glover throughout the strike commencing on 3 February. I reject Respondent's argument. The payroll records of

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New York Propane and Glover, which were introduced by the General Counsel, show that Avila was terminated from the payroll of New York Propane and transferred to the payroll of Glover during the week ending 3 September. What Respondent may have done in terms of its year end W-2 forms is of little significance, particularly because of the fact that its own payroll records clearly establish the transfer as contended by the General Counsel.

Robert Bradley was employed by Synergy Gas Corp. from July to September 1983. After being hired, Bradley was trained by Joseph Schumpf. Bradley was trained to replace Schumpf on the route that Schumpf had driven for the preceding 2 years when he was on the Glover payroll. After the training was complete, and from approximately mid or late August until Bradley's discharge in late September 1983, Bradley replaced Schumpf on that route. Respondent did not offer reinstatement to one of the strikers.

Anatin Rouzeau was a mechanic employed by Vogel's, Inc. in Brooklyn, New York.. Payroll records for the period ending 20 August 1983 reflect that Rouzeau was terminated from the Vogel payroll. Payroll records of Glover show that from the payroll period ending 17 September 1983 until late December 1983 or early January 1984, Rouzeau was transferred and worked at Glover. His name appears on the Glover payroll throughout that period. During the payroll period ending 7 January 1984, Rouzeau was returned to the payroll of Vogel. In its post trial brief, Respondent admits that Rouzeau was "lent temporarily" to Glover. Nevertheless, Respondent notes that Rouzeau's W-2 form for 1983 showed no wages from Glover. Respondent does not explain this discrepancy, and I find it unnecessary to resolve. Payroll records of both Vogel and Glover clearly establish that

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Rouzeau was in fact terminated from the one payroll and transferred to the other for a period of months during late 1983. Respondent did not offer reemployment to any of the striking employees.

By letter dated 19 September 1983, Respondent advised the Union that a decision had been made to merge the operations of Synergy at Deer Park and those of Glover at Patchogue. This letter notified the Union that "the operation of Synergy Gas Corporation will be transferred to Patchogue and pending completion of the corporate re-organization that operation and the operation of Glover will be run on a parallel basis." The letter concluded by inviting the Union "to conduct further negotiations based upon the effects of this decision or relative to the entire body of the negotiations heretofore had and presently pending." The Union did not request negotiations or otherwise respond to this letter.

By letters dated 30 September 1983, Glover wrote to the striking employees individually stating that Glover was trying to update records concerning the availability of employees who went out on strike. The letter asked employees to complete an enclosed questionnaire and return it to Respondent. The enclosed questionnaire asked employees to check whether they had obtained other employment and would not return to work at Glover or whether they would return to work at Glover if a job became available. The form also asked employees to correct their mailing address if necessary and to provide their telephone number. By letters dated 14 December 1983, Respondent again wrote to some of the employees who had gone out on strike. This letter stated that Respondent had received no reply to its first letter and enclosed another copy of the questionnaire described above. The letter of 14 December concluded by stating, "If we

receive no reply to this letter, we will assume that you are not interested in returning to work at Glover Bottled Gas Corp." Employees Robert Zak, Raymond Frey, and Nicholas Kahn all replied to Respondent's letter by indicating they would return to work at Glover if jobs became available. Joseph Leone and Robert Cabral responded indicating that they had obtained other employment and would not return to work at Glover. Employees David Wahlfeld, William Jones, and Stanley Wnenta received copies of at least one of Respondent's two letters, as is reflected by certified mail, return receipts. None of them replied to Respondent's letters. Although a copy of Respondent's letters was addressed to employee John Pickford, it is not known whether he received either copy, for there is no return receipt offered by Respondent.

As already described above, New York Propane employee William Ruthig was observed by Kendrick, Estes and Dean performing bargaining unit work, including "pick-ups" and bulk deliveries to customers of Glover Bottled Gas both prior to, and subsequent to, the Union's unconditional offer to return to work. On 9 January 1984, Ruthig was granted a small wage increase. On the form in Ruthig's personnel file granting the raise, the reason for the increase was described as "driver/yard man/works at Glover when needed." I therefore find Ruthig was continuing to perform bargaining unit work at Glover as late as January 1984. Payroll records of New York Propane introduced by the General Counsel reflect that Ruthig worked considerably more overtime than other employees on the New York Propane payroll. The General Counsel argues that, taken in conjunction with the notation on Ruthig's pay raise, it is reasonable to infer that the excess overtime performed by Ruthig represented work performed at Glover. Respondent argues conversely that it is impossible to determine from looking at a payroll whether Ruthig

worked at New York Propane or at Glover. Respondent doubts that it would be possible to make this determination even from one of its timecards. I find it significant, as did Respondent, that Ruthig worked a sufficient amount at Glover to warrant that notation as the reason for giving Ruthig a pay raise. The General Counsel's argument concerning the appropriate inference to be drawn from the amount of overtime credited him at New York Propane is a reasonable one, just as it was reasonable for Respondent to note Ruthig's help in granting him the pay raise.

In summary, Respondent has offered no substantial business justification for not recalling strikers to the four available positions in April 1983. Available evidence establishes that employees of New York Propane, including Alvaro Avila and William Ruthig, were used to perform bargaining unit work at Glover. In addition, various positions became available at Glover, which Respondent could have and should have filled by strikers. One position of mechanic's helper became available in June when permanent replacement Schutt was terminated. Another position of yardman became available in August when permanent replacement Karlin was terminated. Two other positions were available in August and September 1983 when Bradley was assigned bargaining unit work of Schumpf and when Avila was transferred to the Glover payroll rather than rehire a striker. Yet another position became available in September when Rouzeau was transferred from the Vogel payroll to that of Glover. After January 1984, Respondent relied less on transferring employees from sister companies into the bargaining unit and began instead to hire new employees to replace permanent employees who left. Permanent replacements Kevin McKeever and Walter Denton both terminated their employment with Glover. Branch Manager Donald Bittner testified that McKeever and Denton were replaced by new hires Steven Hains and

Michael Higgins. In addition, Respondent hired John Stout as a bulk driver and Jose Lopez as a combination installer and bulk driver.

The evidence establishes that in addition to the four unfilled positions that Respondent should have been able to offer to strikers as soon as they made their unconditional offer to return to work, at least nine other positions described above became available that Respondent failed to offer to strikers. By failing to offer available positions to strikers, by using employees of sister companies to perform bargaining unit work in order to avoid recalling strikers, and by hiring new employees without offering those positions to strikers, Respondent violated Section 8(a)(1) and (3) of the Act. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 735 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968) enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970); *Pepe's Inwood Packing Co.*, 206 NLRB (1973); *Harvey Engineering Corp.*, 270 NLRB 1290 (1984).

Respondent's unlawful discrimination adversely affected a group or class comprised of all striking employees. The record does not reflect the relative seniority of all strikers, and it is therefore not possible at this time to determine with certainty which strikers should have been recalled to specific vacancies. I shall therefore leave that determination to the compliance stage of this proceeding. I find, however, that Respondent's 30 September and 14 December letters to employees, as well as the responses or non-responses to those letters, do not in any way serve to remove any individual from the class of employees discriminated against. Respondent's course of discrimination began on 18 April when Respondent received the Union's unconditional offer to return to work, and Respondent's letters to employees more than 5 months later cannot serve to terminate

that course of unlawful conduct nor deprive any employee of their rights under the Act.

C. *The Reinstatement of Estes and Dean*

Estes was reinstated on 29 July 1983. Dean was reinstated on 1 September 1983.

When Estes was recalled to work, he was notified by Management Representative Joel Garey that he would be returning to a nonunion shop, that he would be stripped of his seniority rights, and that he would not receive any vacation during calendar year 1983. When Estes and Dean were recalled, each of them was assigned for a period of approximately 3 weeks to 1 month to perform yard work. Yard work, as the name implies, is the least skilled maintenance work on and around Respondent's premises. The record shows that this work is traditionally assigned to newly hired employees. Dean testified without contradiction that he had not been assigned yard work since the first month he was hired in 1967.

Respondent notes correctly that Estes' license to drive had been revoked. Respondent argues that Estes could hardly have been expected to work as a driver and that yardman was the only position left open. Respondent, however, admits that after approximately 3 weeks Estes was assigned to work with another driver on installations. Respondent offers no evidence that installation work was not available as soon as Estes was reinstated. Indeed, as I have found above, the available evidence points instead to the conclusion that work was available not only for Estes and Dean but for two other strikers as soon as the Union made its unconditional offer to return to work. Respondent has shown no justification whatever for treating Estes and Dean as

new employees and making them perform yardwork for the first month after being brought back. Particularly in view of Estes conversation with Management Representative Joel Garey, in which Garey told Estes that he would be stripped of seniority rights, I am convinced that Respondent was purposely attempting to humble Estes and Dean by treating them as new employees and making them perform yard work for a month before reassigning them to normal duties. By doing so, Respondent discriminated against Estes and Dean in violation of Section 8(a)(1) and (3) of the Act.

D. *Assignment of Overtime*

Estes testified that when he returned to work on 29 July, he discussed working conditions with Service Manager Donald Bittner. According to Estes, Bittner stated that in accordance with the instructions of Respondent's counsel, Shientag, Estes would no longer receive overtime. Estes had earned approximately 10 to 15 hours of overtime per week prior to the strike when overtime was assigned on the basis of seniority. Portions of Estes' testimony were quite believable while other portions were not. Estes exhibited significant hostility toward Respondent on cross-examination, and I was left with the distinct impression that he was able and willing to exaggerate when he thought it might be helpful to the Union's case. I do not credit Estes that Bittner told him he would no longer receive overtime. The record reflects that, in fact, Estes began receiving overtime the very first week after he was reinstated. What I believe actually happened is Bittner told Estes that overtime would no longer be assigned on the basis of seniority.

In Respondent's proposals to the Union throughout negotiations, Respondent demanded a contractual provision

regarding overtime, which provided: "Overtime assignments shall be rotated among the employees equitably and without regard to seniority." In his post trial brief, the General Counsel argues that "Respondent never made a proposal during negotiations that the manner of assigning overtime be changed" from what it had been prior to the strike. I am at a loss to understand the General Counsel's argument unless he simply overlooked the contractual provision regarding overtime. Nevertheless, Respondent's position was clear throughout negotiations and was contained in its final offer to the Union in January. When the Union commenced its strike in February 1983, the parties were far apart on the most important substantive issues. After the strike started in February, negotiations were suspended indefinitely and neither party requested to meet with the other until late October 1983. Contrary to the argument of the General Counsel, I find that at the time the strike started, the parties had indeed reached impasse on the terms of a new collective-bargaining agreement. Regarding all these circumstances, the fact that the Union was willing to make further concessions is of little real significance. The willingness to make concessions standing alone is not sufficient to negate an impasse. The Union began bargaining with such high demands that if such were the case, it could continue to make concessions and thereby frustrate impasse ad nauseam. The parties were so far apart and so far from reaching a substantive agreement that the disparity between their respective positions at the time the strike started can only be described as an impasse.

As the General Counsel points out, Estes did not receive an average of more than 10 hours of overtime work per week until the payroll period ending 26 November 1983. Even after 26 November, Estes did not average 15 overtime hours per week. Dean did not receive more than 10 hours of overtime in any 2-

week pay period until he had been back to work approximately 3 months. Avila, Denton, and Vanhulsent, all less experienced drivers, worked more overtime than Dean through the payroll period of 24 June 1984. Nevertheless, Estes and Dean were assigned overtime work beginning with the very first week of their respective reinstatements. They continued to work substantial overtime hours thereafter. In calendar year 1982, Estes received gross wages of approximately $22,000, while Dean received gross wages of approximately $20,000. After Estes was reinstated, he earned wages of approximately $11,000 in the remaining 5 months of calendar year 1983. After Dean was reinstated, he received gross wages of approximately $8500 in the remaining 4 months of calendar year 1983. Estes' gross wages for calendar year 1984 were approximately $23,000, while Dean's were approximately $22,000. Estes' wages exceeded every member of the bargaining unit except Avila. Dean exceeded every member of the bargaining unit except Avila and McKeever. McKeever's wages for the year exceeded Dean's by only $11.

In summary, the evidence reflects that almost immediately after Estes and Dean were reinstated, they began to receive overtime assignments. Throughout the remainder of calendar year 1983, the amount of overtime assigned Estes and Dean was less than some employees, but more than others. It must be concluded that the amount of overtime work assigned Estes and Dean since their reinstatements has been in general conformity with Respondent's contractual proposal that overtime work be assigned equitably and without regard to seniority. There is no evidence of any discriminatory intent on Respondent's part in the assignment of overtime work since the reinstatement of Estes and Dean. Accordingly I shall dismiss the allegation of the complaint that Estes and Dean were assigned overtime work in a discriminatory matter.

Appendix C

E. *The Discharge of Bradley*

In April 1983 when the Union made its unconditional offer to return to work on behalf of Glover employees and no one was immediately reinstated, employees at Glover continued to picket that facility for some time. Picketing gradually diminished and eventually ceased altogether. By September, only Estes and Dean had been reinstated at Glover. In mid-September, Respondent notified the Union of its intention to merge the operations of Synergy at Deer Park and those of Glover at Patchogue. On 16 September 1983, Synergy employees James Flanagan, Robert Bradley, Gregory Garland, and Norbert Jones signed authorization cards on behalf of the Union. Bradley solicited cards from Garland and at least one other employee.

During August and September 1983 Bradley was assigned to drive the route that had previously been handled by Glover employee Joseph Schumpf. On 19 September, Bradley and bulk driver Franklin were directed by dispatcher/Office Manager Denise Nichols to begin parking their trucks at night at a new location in Patchogue, approximately 20 miles from Deer Park. Although it was standard procedure for drivers to leave the keys in the trucks overnight, on 19 September, Bradley and Franklin took their truck keys home with them, at Nichol's direction.

On the following morning, 20 September, Bradley telephoned Respondent and left the message with its answering service that he was sick and would not be coming to work. On learning that the keys to Bradley's truck were not available, Respondent telephoned Bradley and asked Bradley to bring the keys to the office. Bradley, who lives about a mile and a half from Respondent's office, declined, saying that he was too sick to do so. Bradley told Respondent that if Respondent sent someone to

his house to get the keys, Bradley would meet them at the door. Although Respondent was apparently unable to find a second set of keys for the truck, it did not send anyone to Bradley's house. Instead, Respondent had another employee change ignition switches on the truck. Employee Flanagan testified that he changed ignition switches on Respondent's trucks in the past and that this job takes about 15 minutes and costs approximately $10. I found Flanagan credible.

About 9 a.m. that same day, Joseph Schumpf, who was then on extended sick leave recouperating from a heart attack, drove to Synergy's bulk plant in Deer Park. As Schumpf approached the facility, he observed Bradley standing in the street near the entrance talking to employee Ralph Kendrick. Kendrick was one of Respondent's most active union supporters. During the strike, Kendrick regularly picketed Respondent's premises and frequently directed verbal harassment at Schumpf, the only strike breaker. Kendrick and other union members sometimes followed Schumpf on his daily route to engage in ambulatory picketing. When Schumpf saw Bradley talking to Kendrick, Schumpf drove to the Synergy Deer Park office and informed Respondent that he had seen Bradley talking to Kendrick.

Bradley denies that he ever went to any of Respondent's facilities on the morning in question. Bradley testified that he was sick and that he remained at home that entire morning. Nevertheless, Bradley's affidavit, given to an agent of the Board during the initial investigation of this case, contains no reference to him being sick.

Employee Flanagan, who was called as a witness by the General Counsel, testified that he was present in the Deer Park office on the morning in question when Schumpf entered.

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Flanagan heard Schumpf tell Office Manager Dempsey that he had just seen Bradley talking to Kendrick. According to Flanagan, Schumpf was "really nervous and jumpy." Schumpf told Dempsey, "We got to get rid of him now. . . . That's not right that he should be doing that [talking to Kendrick]." Schumpf then informed Edward Williams, who was in charge of the service operation, that he had seen Bradley talking to Kendrick. After Schumpf spoke to Williams, Williams telephoned Respondent's corporate headquarters in Farmingdale where he spoke to a Mr. Russel, vice president in charge of service. According to Williams, "I explained the whole situation, what had happened; he said okay, he'd handle it from there." That's the end of my conversation or doings with it. Schumpf then went to Respondent's corporate headquarters and met with John Vogel, Respondent's executive vice president. Schumpf told Vogel what he had observed and admits adding that he "believed there would be trouble with this man being that he is now collaborating with the Union." Schumpf testified that Vogel did not say anything in response to Schumpf's suggestion that Bradley be fired.

Later that same day, Russel telephoned Plant Manager Donald Bittner and directed him to discharge Bradley. Bittner testified candidly about his conversation with Russel and his later conversation with Bradley. Bittner testified that when Russel first called, he asked if Bradley was a probationary employee. Bittner said that Bradley was. Bittner testified that Russel then stated: "He [Bradley] did not bring keys in because he was ill, but yet he was seen in front of one of our plants and we're dismissing him; I want you to dismiss him for lying."

Bittner telephoned Bradley that afternoon to inform Bradley that he was being discharged. According to Bradley, he asked Bittner why he was being fired. Bittner allegedly replied that it

was because Bradley had keys to the truck. According to Bradley, he then explained why he had the keys. Bittner replied that it did not make any difference, that Respondent had to have a person put a new ignition in the truck. According to Bradley, Bittner also said Bradley was being fired because he did not come in to work that day. Bradley allegedly explained that he was sick. According to Bradley, Bittner then stated again that it did not make any difference, that Bradley was terminated and that was the way it was.

On direct examination, the General Counsel did not ask Bradley whether he had lied to Respondent about being sick. In fact, I had the distinct impression that that subject was studiously avoided. On cross-examination, Bradley claimed that he was sick and in fact had not gone to Respondent's premises. I do not credit Bradley. Further, I find Bittner's version of the conversation with Bradley when Bradley was discharged to be more straightforward and reliable. Bittner testified simply that he was told by Russel to dismiss Bradley for lying "and that's what I told him: 'Mr. Bradley, you're being dismissed for lying.' "

The General Counsel presented evidence that some time prior to 20 September, employee Franklin had taken truck keys home with him and had failed to report to work the next day. As a result, employee Flanagan had to replace the ignition switch in Franklin's truck. The General Counsel notes that no discipline was taken against Franklin and argues that this is evidence of disparate and discriminatory treatment of Bradley. I find this argument unconvincing, however, because I believe it attempts to blur the real reason for Bradley's discharge. There is no question that Respondent learned of Bradley's union association through employee Schumpf. The General Counsel has even presented some limited evidence of animus. What the General Counsel has

failed to show, however, is that Bradley's discharge was disparate or discriminatory. Bradley was not discharged simply because he had taken home keys to one of Respondent's trucks. Rather, he had taken them home, called in sick the following day, and refused to bring the keys to Respondent's premises because he claimed to be too sick to do so. Whether Bradley was sick or not, he refused to bring in the truck keys because he was supposedly too sick to do so. Nevertheless, he was seen a short time later in front of one of Respondent's facilities. Bradley lied to Respondent, if not about being sick, then most certainly about being too sick to bring in the truck keys to Respondent. The General Counsel has presented no evidence that any other employee has been allowed to lie in such a manner to Respondent without incident. In short, the General Counsel has failed to carry its burden of establishing that Bradley was accorded disparate treatment. Even if I were to infer such a conclusion, I would nevertheless find that Bradley would have been discharged under these circumstances without regard to his union activity. I agree with Respondent that for some ulterior motive of his own, Bradley was simply trying to deprive Respondent of the use of one of its bulk delivery trucks. I am convinced that Respondent would not have tolerated such conduct under any circumstances. I find that Bradley was discharged for cause, and I shall dismiss the allegation in the complaint that he was discharged in violation of Section 8(a)(1) and (3) of the Act.

F. *The Unilateral Change in Health Benefits*

At the last bargaining session between the parties before the strike began, Respondent's final offer included the prior contract's health benefit plan. When the strike started on 3 February the parties indefinitely postponed further negotiations. By the time the Union made its unconditional offer to return to

work on 15 April, Respondent had hired permanent replacements for 11 of 15 positions left vacant by the strike. Eight months after the strike started, by letter dated 10 October 1983, Respondent amended its last offer. The welfare and pension provision of Respondent's final offer was amended to provide that Respondent would agree to cover employees as participants in a company-sponsored profit-sharing plan. The health benefits section of Respondent's final offer was amended to provide that Respondent would agree to cover employees in a company-sponsored employee health benefits plan. The letter ended by stating that unless Respondent was advised that the Union wished to negotiate further, it was Respondent's intention to take the necessary action to cover employees in the bargaining unit on 17 October. Respondent stated: "Such action if taken, will be effective for the plan year commencing April 1, 1983."

The Union did request negotiations in response to Respondent's letter, and the parties met twice during October 1983 to discuss this matter. Discussions were limited to Respondent's proposal to cover employees by its own health benefits plan. There was no objection by the Union and no discussion concerning the inclusion of employees in Respondent's profit-sharing plan.

The first meeting to discuss health benefits was held at the University Club at Hofstra University. At this meeting, Respondent discussed with the Union a two-page document summarizing the benefits that would be provided to employees. This document reflects the various coverages, deductibles, and coinsurance factors. There is no indication that the Union objected to, or proposed alternatives to, Respondent's substantive coverage. At the first meeting, however, the Union did request figures concerning the cost of the proposed plan to Respondent.

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A second meeting was held between the parties on 20 October 1983 at the Howard Johnson's restaurant in Sunnyside, Queens. Kendrick testified that at the second meeting, Respondent continued to fail to provide cost figures. Respondent's counsel, Shientag, also testified concerning that meeting. Shientag testified that at this second meeting he orally provided the cost information concerning the new plan. I credit Shientag. As the General Counsel notes, Shientag admits that he did not provide the costs of the then-current plan to the Union at this second meeting. There is no indication, however, that the Union ever specifically requested Respondent to provide it with the cost of the current plan. Nor was there any particular reason for the Union to do so because that information was already available to both it and Respondent.

The General Counsel concedes that at this second meeting the Union refused to agree to Respondent's proposal concerning health benefits. Kendrick described the conclusion of the meeting as follows: "It didn't end on a happy note. . . . It wasn't really like a negotiation, it was this is what I'm going to do, take it or leave it." Shientag, however, paints a much different picture of the parties' final positions. As I have noted, Shientag testified that at the meeting on 20 October he verbally provided the Union with the requested cost information. I credit Shientag. According to Shientag, Respondent's position at the meeting of 20 October was that the Company was willing to consider any plan the Union might come up with for which the cost would be less than the one then in effect. Shientag asked the Union if they had anything like that to propose, and the Union replied no. According to Shientag, the meeting ended by the Union stating that it objected to Respondent instituting its proposal. Shientag replied that because the Union had not come up with anything better, Respondent intended to institute its proposal immediately. The meeting then

ended. I found Shientag's testimony about this meeting to be candid, and I credit Shientag. Following the meeting, Respondent implemented its proposal regarding both the profit-sharing plan and the employee health benefits plan.

The General Counsel contends that Respondent implemented the health benefits plan unilaterally. The General Counsel argues that implementation was unlawful because the parties had not reached a genuine impasse since Respondent refused to provide requested information concerning the cost of the plan. I credit Shientag, however, that he provided the requested information orally at the meeting on 20 October. When the Union struck on 3 February, the parties were at an impasse concerning the terms of a new collective-bargaining agreement. There is no indication that when Respondent amended its final offer in October 1983 regarding the employee health benefits plan that it did so in bad faith or to otherwise frustrate an agreement. The General Counsel apparently concedes that it was not per se unlawful for Respondent to amend its substantive contract proposals. During October 1983 the parties held two bargaining sessions at which the only subject of discussion was Respondent's amended health benefits proposal. During the second meeting Respondent offered to consider any alternative plan the Union might wish to propose that would lower the cost of health benefits to Respondent. The Union stated that it had no proposal to make, but that it objected to Respondent's proposed plan. Under the circumstances, including the fact that the Union did not have any proposal to make to Respondent, I find that the parties had in fact reached impasse. Accordingly, I find that Respondent's implementation of its proposal was not unlawful, and I shall dismiss that allegation of the complaint.

Appendix C

G. *Vacation Pay*

Employees Estes and Dean were reinstated on 29 July and 1 September 1983, respectively. Employee Harry Serres was recalled during the payroll period ending 29 October 1983. During November 1983, Serres was forced to take 2 days off from work because of his father's death. Although the expired collective-bargaining agreement provided for bereavement pay, and although Respondent never proposed to change that portion of the contract, Respondent never paid Serres for the 2 days of bereavement pay.

After Estes, Dean, and finally Serres were reinstated, Respondent also failed to pay them vacation pay for calendar year 1983, which was provided for in the expired collective-bargaining agreement.

The expired collective-bargaining agreement contained a lengthy section comprised of 11 subsections dealing exclusively with vacations. These subsections relate to posting of vacation schedules, vacation periods, and splitting of vacations. One subsection provides, "The pay for vacations shall be made in advance and shall be based on the classifications of work performed for the major portion of the yearly vacation qualifying period." Another subsection provides, "The qualifying period for vacations shall be April 1 to March 31, of each year."

Respondent admits that it has refused to pay Estes, Dean, Serres, and other reinstated strikers any vacation pay for calendar year 1983. Simply stated, Respondent's defense is that employees were on strike on March 31 instead of working, and are therefore not entitled to vacation pay. According to Respondent, the interpretation to be given the most recently

expired contract is that an employee must work continuously from April 1 to March 31 to be eligible to receive vacation pay. Respondent contends that employees on strike on March 31 were not on Respondent's payroll and thereby voluntarily waived or lost their eligibility to receive vacation pay. At the trial, Respondent's counsel stated:

> Unfortunately, these gentlemen went on strike — unfortunately for them from our point of view, on February 3, 1983 and remained on strike until — the middle of April 1983 and therefore were not entitled to any vacation during 1983.

Employee Ralph Kendrick testified credibly and without contradiction that while employed by Respondent he had occasion 1 year to miss approximately 7 consecutive weeks of work due to illness, but that he nevertheless received full vacation pay. Kendrick and other employees all testified that they knew of no policy penalizing employees for missing various periods of work during the "qualifying period" provided in the contract. In response to this testimony, Respondent's counsel stated at the trial:

> The thing that is important is the existence of the person as an active employee. When I say "active," I mean one who is there and ready, willing and able to work; if in fact he's prevented from working by the fact that he has a running nose on March 31st or a broken hand, would not — we would not be taking the position that he would be disqualified, but if he is voluntarily absent from work without

> an excuse for it we would take the position that he is disqualified from earning his vacation and then that would also assume that he had a year's service or more of continuous service during — occurring during the preceding year.

The evidence on this issue leaves no room for doubt that Respondent purposely denied striking employees vacation pay to penalize them for having exercised Section 7 rights by engaging in a strike. There is nothing in the most recently expired collective-bargaining agreement that specifies 31 March as a magic date for determining an employee's eligibility for vacation pay. The qualifying period is a 12-month year from 1 April to 31 March. One of the most simple and straightforward principles of the Act is that striking employees nevertheless remain employees, and for Respondent to argue that striking employees are not on its payroll is to equate them with discharged or otherwise terminated employees. To deny strikers benefits that Respondent would make available to other employees not actively working, such as employees on sick leave, is necessarily to discriminate against them for having engaged in activity protected by the Act and is inherently destructive of Section 7 rights of employees. Accordingly, I find that by unilaterally and discriminatorily withholding bereavement pay and vacation pay from strikers, Respondent has unlawfully discriminated against them in violation of Section 8(a)(1) and (3) of the Act and has unilaterally abrogated the terms and conditions of their employment in violation of Section 8(a)(1) and (5) of the Act. *Electro Vector, Inc.*, 220 NLRB 445 (1975); *Cutten Supermarket*, 220 NLRB 507, 510 (1975).

Appendix C

H. *The Discharge of Ralph Kendrick*

In July 1982, about 2 weeks before the expiration of the most recent collective-bargaining agreement between the parties, a theft of cash and checks occurred at Respondent's Glover facility. Five employees were requested by Respondent to take a polygraph examination concerning the theft. Two employees did so. The three did not. The three who did not, Ralph Kendrick, William Kampe, and Walter Brackett, were discharged. Thereafter, protracted litigation ensued concerning the arbitrability of the discharges and the power of an arbitrator to award reinstatement for a period of time subsequent to the expiration of the collective-bargaining agreement. Ultimately, the court of appeals held that because the theft had occurred prior to the expiration date of the collective-bargaining agreement, the discharges that occurred subsequent to the expiration of the agreement were nevertheless arbitrable and that reinstatement, if appropriate, could be awarded for a period of time subsequent to the expiration of the agreement.

Respondent and the Union then arbitrated the matter of the discharges themselves. The arbitrator found that requiring Kendrick, Kampe, and Brackett to take a polygraph test administered by police violated their constitutional rights and that their discharges for refusing to take such a test were improper. The arbitrator ordered that Kendrick, Kampe, and Brackett be reinstated. The court of appeals refused to disturb the arbitrator's award.

Throughout all the negotiating sessions that preceded the strike in February 1983, the Union demanded a contractual provision that no employee would be required to take any form of polygraph test as a condition of employment. Respondent

uniformally rejected that demand. Respondent took the position that it would require such tests if and when it desired to do so.

On 4 June 1984, Respondent reinstated Kendrick pursuant to the arbitrator's award.

By letter dated 6 June 1984, Respondent wrote to the Union:

> Please be advised that, unless we are advised by you prior thereto that you wish to negotiate on the matter, Synergy Gas Corporation (formerly known as Glover Bottled Gas Corp.) will, effective June 18, 1984, adopt the following policy.
>
> > Any employee shall, upon request of his superior or any manager or officer of the company, submit to a polygraph examination (i.e. lie detector) test with reference to the employee's use, misuse, handling, mishandling, embezzlement, misappropriation or other misconduct or conduct concerning the company's money, property or equipment. The failure or refusal of the employee to submit to such test as and when requested shall result in an immediate discharge.
>
> Please be advised further that the foregoing policy will be incorporated into the terms of any collective bargaining agreement which the company may negotiate and if such

agreement contains a provision for arbitration of grievances, the following provisions will be added to the appropriate sections, to wit:

> A discharge for failure to submit to a polygraph test as required hereunder or based upon the results thereof shall not be subject to arbitration.

The Union requested to negotiate with Respondent about the matter of polygraph examinations and a meeting was arranged for 27 June. On 19 June Plant Manager Bittner informed Kendrick that he was being scheduled to take a polygraph examination. Kendrick advised Bittner that he would not provide an answer whether he would take the polygraph examination until after the meeting between Respondent and the Union scheduled for 27 June.

A meeting between Respondent and the Union was held on 27 June as scheduled. The issue of polygraph tests was the only issue discussed at this meeting. Respondent's position remained fixed throughout this meeting. Respondent insisted that its policy as stated in the letter of 6 June be implemented, and that it would agree to no other alternative. Respondent concedes that at this meeting, the Union made a number of proposals regarding the administration of such a test, including the submission of questions by the Union presence of counsel and arbitration of discharges resulting from the test. The Union, in fact, offered to agree to the administration of such tests if certain issues arising thereunder and the results of the test were arbitrable. As Respondent concedes in its posttrial brief: "The Company refused to permit any form of participation in the administration of the test or to accede to any arbitration regarding discharges

arising out of the tests or refusal to take the test, other than to permit the Union to suggest the names of testing agencies for consideration by the Company without any obligation to employ them." Respondent then announced that it intended to implement its polygraph policy the following day, and the meeting ended. After the meeting, the Union suggested to Kendrick that he prepare and carry with him a written response declining to take a polygraph examination so that when Respondent made such a demand of Kendrick, his reply would be ready.

A hearing before the Board involving these same parties was scheduled to be held in Cases 29-RC-6037 and 29-UC-240 on 11 July 1984. In late June, the Union's counsel told Kendrick about the scheduled hearing and asked Kendrick if he would be willing to attend. On 28 June, Kendrick told Bittner that he would be absent from work on 11 July because of the hearing, and Kendrick wrote a note on Bittner's calandar that he would miss work that day. At the time, Bittner simply said okay.

On 10 July, Bittner approached Kendrick about Kendrick missing work the next day. Bittner told Kendrick that John Vogel had stated he wanted Kendrick to come to work on 11 July and that unless Kendrick had a subpoena to appear at the Board hearing on 11 July, Kendrick would be suspended for the rest of the week without pay if he should miss work. Kendrick told Bittner that he did not have a subpoena at the time, that there might be one waiting for him at home in the mailbox, but that subpoena or no subpoena, he was going to be at the Board hearing the following day. Bittner telephoned Vogel. While Bittner spoke to Vogel, Bittner turned to Kendrick and asked, "John Vogel wants to know if you enjoy working for this company?" Kendrick replied that he loved working for Respondent and that is why he returned to work when he was offered reinstatement. Bittner

repeated Kendrick's reply to Vogel. Bittner then asked Kendrick, "Then John wants to know why you insist upon going to the Board?" Kendrick responded that he also loved his Union and if they wanted him to go to the Board hearing, that's where he was going to be. Bittner repeated this to Vogel, then listened for a few moments, and hung up. Bittner then told Kendrick, "You have a way of getting this guy crazy."

A few moments later, while Kendrick was still talking to Bittner, Bittner received another call from Vogel. Bittner then told Kendrick, "John wants you to go to this executive security consultant company on Thursday (July 12) and take a polygraph test." Kendrick replied that was a silly suggestion because Kendrick was going to be at the Board hearing on 11 July and he had already been told he would be suspended for the rest of the week. Kendrick stated he did not think Respondent could tell him what he had to do while he was suspended. Bittner replied, "Well, I'm just passing the information along." Kendrick then gave Bittner the reply, which he had prepared earlier, declining to take the polygraph test. Bittner then made a phone call, read Kendrick's reply over the phone, and hung up. A few moments later, the telephone rang. Bittner answered it by saying, "Hello, Mr. Shientag." Bittner then began writing something on a small piece of paper which ultimately turned out to be Kendrick's discharge slip. This states:

> By reason of your written refusal dated 7-10-84 to take the polygraph test scheduled for July 12, 1984 as instructed, you are hereby discharged.

The General Counsel contends that Respondent acted unlawfully by unilaterally instituting its polygraph policy and by discharging Kendrick pursuant to such an unlawfully instituted

policy. The General Counsel also argues that Kendrick was discharged discriminatorily in violation of Section 8(a)(4) of the Act because of Kendrick's participation in a Board proceeding. Respondent argues that its polygraph policy was not instituted unilaterally but rather after bargaining with the Union to impasse about such a policy. Respondent also denies that Kendrick's participation in the Board proceeding scheduled for 11 July, had anything to do with his discharge.

The record convinces me that Respondent did institute its polygraph policy unlawfully and that it discharged Kendrick for a dual unlawful motive: to enforce its unlawfully instituted policy and to retaliate against Kendrick for participating in a Board proceeding scheduled for 11 July. After being ordered by an arbitrator to reinstate Kendrick, Respondent demanded a contractual provision so broad in scope that it would allow Respondent to require employees to subject themselves to polygraph examinations on demand. Refusal to submit to a polygraph test would result in immediate discharge. Even more significant, however, was Respondent's demand that a discharge for refusing to submit to the test "or based upon the results thereof" would not be subject to arbitration. It is apparent from what transpired at the meeting on 27 June that Respondent met with the Union solely for appearance sake and that it never bargained with the Union about this demand with an open mind. Respondent refused to consider or even discuss reasonable suggestions made by the Union regarding the policy. Respondent clung steadfastly with a fixed position to its demand that any discharge resulting from a polygraph examination not be subject to arbitration. Respondent's demand effectively required the Union to give up any right to represent discharged employees or to seek effective remedy for an employee wrongfully discharged pursuant to a polygraph examination. Respondent's position was so inherently objectionable that it was necessarily designed to

frustrate the parties ever reaching agreement on the polygraph issue. Further, it is apparent that Respondent's demand on the polygraph issue was not made in good faith, but rather was designed to frustrate the earlier decision of the court of appeals and the arbitrator who ordered that Kendrick be reinstated. I find that Respondent's position on the issue of polygraph examinations, and its pro forma negotiations with the Union on this subject evidence bad faith. No good-faith bargaining every took place on the issue of polygraph examinations. Thus, there was no good-faith impasse that might allow Respondent to institute such a policy, and I find that by instituting its polygraph policy, Respondent did so in violation of Section 8(a)(1) and (5) of the Act.

Concerning Kendrick's discharge on 10 July 1984, it is obvious that what precipitated his discharge was Kendrick's conversation with Bittner on that day. Bittner first informed Kendrick that if Kendrick appeared at a Board hearing scheduled for the following day without having been subpoenaed, Kendrick would be suspended for the rest of the week. Kendrick told Bittner that he would be going to the hearing whether or not he had a subpoena. Bittner telephoned John Vogel to inform Vogel of Kendrick's position. Vogel, through Bittner, asked Kendrick if he enjoyed working for Respondent and why he insisted on going to the Board. When Kendrick answered that he not only loved working for Respondent but loved his Union as well, Vogel became angry. A few minutes later, Vogel telephoned Bittner with the demand that Kendrick submit to a polygraph examination on 12 July, the day after the scheduled Board hearing. Respondent was countering Kendrick's willingness to participate in a Board hearing on behalf of the Union with a demand that he submit to a polygraph examination. Kendrick had once before refused to submit to Respondent's demand for a polygraph examination,

and this is precisely what resulted in his earlier discharge. Respondent's demand that Kendrick submit to a polygraph examination on 12 July was simply a ploy by Respondent to force Kendrick's refusal and thereby put Respondent in a position of being able to discharge Kendrick for refusing to take the examination. In reality, Respondent's actions were in response to Kendrick agreeing to support the Union by participating in and giving testimony at a Board hearing to be conducted 11 July. I find that Kendrick was discharged pursuant to Respondent's polygraph examination policy, which was instituted unlawfully in violation of Section 8(a)(1) and (5) of the Act. I also find that Respondent discharged Kendrick to retaliate against him for agreeing to give testimony before the Board, and that his discharge violated Section 8(a)(1) and (4) of the Act as well.

I. *The Refusal to Bargain*

After 27 June 1984, when the parties met to negotiate concerning Respondent's polygraph policy, neither the Union nor Respondent made any request for bargaining until 9 April 1986. On 9 April, approximately 1 month before the trial began in these cases, the Union wrote Respondent requesting it "to meet and negotiate with respect to a collective-bargaining agreement covering the drivers, platform men and servicemen at the former Glover facilities now operated by Synergy Gas Corporation." Respondent made no response to this request for bargaining.

On 1 July 1986, the Union's attorney, Franklin K. Moss, wrote Daniel Shientag, Respondent's attorney, requesting "the names and addresses of each of the Synergy employees in the bargaining units represented by [the Union]." Shientag did not respond to Moss' letter, and on 8 August 1986 Moss again wrote to Shientag stating:

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> Synergy has repeatedly refused to comply with demands to bargain and relevant requests for information with respect to both the office clerical unit and the driver-serviceman unit, with respect to whose employees, Local 282 is the certified collective bargaining representative.
>
> If we do not hear from Synergy immediately, we intend to file refusal to bargain charges with the NLRB.

Shientag did not answer Moss' letter of 8 August, and on 26 September 1986 the Union filed its charge in Case 29-CA-12653.[1]

Respondent admits that it did not respond to the Union's request for bargaining or request for the names and addresses of unit employees. In its answer to the complaint in Case 29-CA-12653, Respondent alleges certain affirmative defenses: that Respondent had objective considerations that the Union did not represent a majority of bargaining unit employees, that changes in the employee complement relieved Respondent of any bargaining obligation, and that the complaint is untimely and

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1. On 19 August 1986, the Union filed a charge in Case 29-CA-12585 alleging that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with the names snd addresses of employees in a unit of Respondent's clerical employees represented by the Union. Complaint issued, and Respondent filed an answer denying that the Union requested it to bargain or to provide the Union with the names and addresses of unit employees. Thereafter, the General Counsel filed a Motion for Summary Judgment, and on 17 April 1987 the Board issued a decision, *Glover Bottled Gas Corp.*, 283 NLRB 656 (1987), finding that Respondent violated Sec. 8(a)(1) and (5) of the Act as alleged.

barred by Section 10(b) of the Act. At the hearing and in its posttrial brief, Respondent also contended that the complaint was barred and should be dismissed in accord with *Jefferson Chemical Co.*, 200 NLRB 992 (1972).

I reject Respondent's argument that the complaint should be dismissed based on *Jefferson Chemical Co.*, supra, because I find that case altogether different from the one at hand. In *Jefferson Chemical*, a broad Section 8(a)(1) and (5) refusal-to-bargain charge was filed with the Board. Thereafter, a complaint issued and a hearing was held before an administrative law judge. At the hearing, the judge asked the General Counsel if he intended to amend or expand the complaint in any way. The General Counsel assured the judge and Respondent that it did not intend to do so. Thereafter, a new charge was filed and a complaint issued alleging general bad-faith bargaining by Respondent based on facts that occurred prior to the General Counsel's disavowal of any contention that Respondent had engaged in general bad-faith bargaining. The Board dismissed the latter complaint, stating:

> Our dissenting colleagues argued that the General Counsel should not be required to be aware of each and every fact giving rise to a possible unfair labor practice prior to the issuance of a complaint since its investigation is normally limited to the allegations set forth in the charge. While we do not disagree with this principle, we believe that, as a corollary, the General Counsel is dutybound to investigate all matters which are encompassed by the charge, and to proceed appropriately thereafter.

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The complaint herein is based on a request for bargaining made by letter dated 9 April 1986, approximately 1 month before the trial began in this case, and on requests for information made by letters dated 1 July and 8 August 1986, weeks after the original trial was closed. In response to the Union's written request for bargaining dated 9 April, Respondent did not respond by denying the request or affirmatively setting forth any good-faith doubt of the Union representing a majority of employees. In fact, Respondent did not respond at all to the Union's request for bargaining. Although Respondent could easily have responded to the Union's request in such a manner as to affirmatively join issue with its obligation to bargain prior to the commencement of the trial on 13 May 1986, Respondent remained silent. Although from hindsight we now know that Respondent's refusal to bargain predated the beginning of the trial, when the trial began the Union was not acting unreasonably in waiting to file a charge by giving Respondent ample time to respond to its request for bargaining. This case is therefore distinguishable from *Jefferson Chemical Co.*, supra, and *Union Electric Co.*, 219 NLRB 1081 (1975), also cited by Respondent, in two significant respects. First, not all the facts supporting the allegations in the complaint occurred prior to the commencement of the trial. Second, as a result of Respondent's own silence, Respondent's refusal to recognize and bargain with the Union had not been made clear, prior to the commencement of the trial. Accordingly, I reject Respondent's argument that the complaint should be dismissed on these grounds.

I also reject Respondent's argument that the complaint should be dismissed because it is untimely filed and barred by Section 10(b) of the Act. In support of this argument, Respondent attempted to prove through its counsel, Daniel Shientag, that Respondent actually withdrew recognition from and refused to bargain with the Union beginning in January 1986. In October

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1985 and January 1986, Respondent and the Union were involved in an arbitration proceeding. During the course of one of the arbitration hearings in January 1986, Shientag and Moss, the Union's attorney, held a private conversation to discuss possible settlement of the arbitration proceeding. Although Respondent's changes in employee benefits were not the topic of the arbitration proceeding, Moss made a remark during the conversation concerning the changes, which are the subject of this case. Moss stated, inter alia, that Respondent was obligated to bargain over these changes. Shientag testified:

> I told [Moss] that they had not requested any bargaining sessions since the strike, that the only people who had done anything about bargaining was us, that all of the people who had been there at the time of the strike had been replaced and at that time, there were only three that I knew of who had been rehired; all the rest were replacements or had come in there by way of turnover and I just didn't believe that they represented the people in the place anymore.

Respondent argues that Shientag's statement to Moss constituted an unequivocal withdrawal of recognition in January 1986 and that the complaint in Case 29A-12653 is therefore barred by Section 10(b) of the Act. I reject Respondent's argument that Shientag's statement constituted an unequivocal withdrawal of recognition. The purpose of the discussion between Shientag and Moss on this occasion in January 1986 was not to bargain over Respondent's changes in employee benefits or any other working conditions of employees. The purpose of the conversation was to discuss the possible settlement of a specific arbitration proceeding. Nor was there any pending request by the

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Union that Respondent meet and bargain. Further, the Union had no reason to view Shientag's statement as anything other than a matter of opinion since Respondent itself had notified the Union and offered to bargain concerning the proposed changes in its employee benefits plan. I am convinced that in these circumstances Shientag's statement was both intended by him and received by Moss as purely a matter of Shientag's personal opinion. The exchange was nothing more than a parting salvo between two bantering lawyers who had not been able to settle the arbitration dispute. Shientag, who is an articulate and experienced labor attorney, did not state that Respondent was withdrawing recognition from the Union. If Shientag had wished to communicate a withdrawal of recognition, there is no question in my mind that he would have done so in exactly those terms. Accordingly, I find that Respondent did not clearly withdraw recognition from the Union in January 1986 in such a manner as to bar the instant complaint pursuant to Section 10(b) of the Act. Moreover, I find that even if Respondent had attempted to withdraw recognition from the Union in January 1986, it is prevented from doing so by its earlier and yet unremedied unfair labor practices, including its failure to offer reinstatement to a majority of the economic strikers who made unconditional offers of reinstatements and its badfaith bargaining with the Union concerning its polygraph examination policy. An employer may not justify a refusal to bargain premised on a union's loss of majority support attributable to the employer's own unfair labor practices.

I also reject Respondent's contention that it was privileged to reject the Union's request for bargaining and for information about the names and addresses of employees in the bargaining unit because Respondent had objective considerations for believing that the Union did not represent a majority of employees in the unit. It is well settled that an incumbent union

enjoys a rebuttable presumption of continued majority status on the expiration of a collective-bargaining agreement. An employer may lawfully refuse to bargain with an incumbent union only when it can establish either that at the time of the refusal to bargain, the Union in fact no longer enjoyed majority status or that its refusal to bargain was predicated on a good-faith and reasonably grounded doubt of the Union's continued majority status. *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970).

Respondent's admitted failure to bargain with or provide relevant information to the Union constitutes a prima facie violation of Section 8(a)(5) of the Act. Respondent bears the burden of establishing an affirmative defense to its failure to bargain. Respondent contends that it had objective considerations from which to form a reasonable doubt of the Union's majority status based on three factors: the Union had not requested bargaining for almost 2 years only three strikers were employed in the bargaining unit; and there had been a significant turnover in the bargaining unit. The lapse in time from the meeting between the parties on 27 June 1984 to the Union's request for bargaining on 9 April 1986 is not itself particularly significant. In its posttrial brief, Respondent asserts in essence that the Union simply should not be allowed to continue its claim to represent employees after a significant hiatus in bargaining. Respondent is in no position to seriously argue that the Union abandoned, or gave Respondent the impression that it had abandoned, its claim to represent unit employees throughout that period. The Union had been actively and vigorously pursuing the numerous unfair labor practice charges captioned above. Substantial delays occurred while these cases were postponed indefinitely as a result of protracted litigation between the parties on related issues before the Federal courts and, later, before an arbitrator. The lapse of time during which the Union did not

specifically request Respondent to resume contract negotiations is therefore no indication that the Union did not claim to represent or in fact represent Respondent's employees.

Respondent next argues that it experienced expansion and massive turnover in the bargaining unit since the 1983 strike so as to give Respondent good reason for doubting whether the Union continued to represent a majority of employees in the unit. In support of its position, Respondent notes that 11 striking employees were displaced by permanent replacements. Near the end of 1983, Respondent's Deer Park office closed and 7 employees were transferred to the Patchogue facility, thereby expanding the bargaining unit to 22 employees. Between February 1983 and January 1986, a total of 39 individuals were employed by Respondent, representing a significant turnover rate. By January 1986, the bargaining unit consisted of 25 employees, only 3 of whom were employed prior to the strike. Respondent concludes its argument by noting, "To Respondent's knowledge, not one of the employees was a union member."[2]

At the hearing, the parties stipulated that when the Deer Park office closed and certain employees were transferred to the Patchogue facility, the transferred employees constituted an accretion to the bargaining unit at Patchogue represented by the Union. In such accretion situations, there is no reason not to believe that employees accreted to the already existing unit do not favor representation in the same degree as employees already in the unit. Therefore, there is no reason to believe that as a result of the unit expanding, a majority of employees no longer wished to be represented by the Union. Rather, there is every reason to believe that the Union's majority status continued. I also find

2. Respondent does not reveal whether it had any actual knowledge of employees' union membership, what that knowledge might be, or how it might have obtained that knowledge.

both the number of permanent replacements hired and the turnover in the bargaining unit between 1983 and 1986 to be insufficient reasons for finding that Respondent entertained a good-faith doubt of the Union's continued majority status. The Board recently stated that it cannot ascertain strike replacements' union sentiments merely from their having crossed a picket line. *Station KKHI*, 284 NLRB 1339 (1987). The Board is unwilling to presume the union sentiments of strike replacements, and an employer is required to present further evidence to support a claimed good-faith doubt. Moreover, turnover does not constitute sufficient objective considerations to justify a withdrawal of recognition.

Even if employee turnover was a significant consideration in determining whether an employer had an objective basis for forming a reasonable doubt of a union's continued majority status, I would find in this case that because of the numerous unfair labor practices Respondent has been found to have engaged in by not offering available positions to strikers after they made an unconditional offer to return to work, Respondent is precluded from relying on these factors as a basis for its alleged objective considerations. If Respondent had offered available positions to strikers after they made their unconditional offer to return to work, there is every reason to believe that in January 1986 all strikers would have been reinstated and would have comprised an actual majority of the appropriate bargaining unit. Respondent's own unfair labor practices in not offering strikers positions as they became available is the very basis on which Respondent is now able to contend that significant turnover occurred in the bargaining unit. For the reasons stated above, I reject Respondent's arguments that it had a sufficient objective basis to form a reasonable doubt of the Union's continued majority status. Accordingly, I find that by failing and refusing to recognize and bargain with the Union as the representative of its

employees beginning 9 April 1986 and by failing and refusing to furnish the Union with the names and addresses of bargaining unit employees beginning 1 July 1986, Respondent has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Glover Bottled Gas Corp.; Vogel's, Inc.; New York Propane Corp.; Synergy Group, Inc.; and Synergy Gas Corp. comprise a single, integrated enterprise and a single employer within the meaning of the Act, and are now, and have been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to offer available positions to strikers who made an unconditional offer to return to work, by using employees of sister companies to perform bargaining unit work to avoid recalling strikers, and by hiring new employees without offering those positions to strikers, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By purposely attempting to humble employees Gary Estes and Richard Dean by treating them as new employees when they were finally recalled to work, and by making them perform yard work for a month before reassigning them to normal duties, Respondent discriminated against Estes and Dean and thereby violated Section 8(a)1) and (3) of the Act.

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5. Respondent did not discriminate against employees Estes and Dean regarding the assignment of overtime work following their reinstatement, but rather assigned them overtime in general conformity with its contractual proposal that overtime work be assigned equitably and without regard to seniority, and Respondent did not thereby discriminate against Estes and Dean in violation of Section 8(a)(1) and (3) of the Act.

6. Respondent discharged employee Robert Bradley for cause and not because of his activities on behalf of, or support for, the Union, and by discharging Bradley Respondent did not thereby violate Section 8(a)(1) and (3) of the Act.

7. By Respondent implementing its proposed health benefits plan after bargaining with the Union to impasse, Respondent did not violate Section 8(a)(1) and (5) of the Act.

8. By unilaterally and discriminatorily withholding bereavement pay and vacation pay from strikers, Respondent unilaterally abrogated the terms and conditions of their employment and discriminated against them in violation of Section 8(a)(1), (3), and (5) of the Act.

9. By instituting its polygraph policy after bargaining in bad faith with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

10. By discharging Union Steward Ralph Kendrick pursuant to Respondent's unlawfully instituted polygraph examination policy and in order to retaliate against Kendrick for agreeing to give testimony before the Board, Respondent violated Section 8(a)(1), (4), and (5) of the Act.

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11. By failing and refusing to recognize and bargain with the Union as the exclusive representative of Respondent's employees employed at, out of, or dispatched from its Patchogue facility, including, drivers, platform men and servicemen, and by failing and refusing to provide the Union with the names and addresses of employees in the appropriate collective-bargaining unit, Respondent violated Section 8(a)(1) and (5) of the Act.

12. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the Act, I shall recommend that it be ordered to cease and desist thereform and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

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3. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rule and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rule, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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ORDER

The Respondent, Glover Bottled Gas Corp., Patchogue, New York; Vogel's Inc., Farmingdale, New York; New York Propane Corp., Farmingdale, New York; Synergy Group, Inc., Farmingdale, New York; Synergy Gas Corp., Deer Park, New York; its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to offer available positions to strikers who made an unconditional offer to return to work, using employees of sister companies to perform bargaining unit work to avoid recalling strikers and hiring new employees without offering those positions to strikers.

(b) Treating strikers as new employees when they are recalled to work by making them perform yard work before reassigning them to normal duties.

(c) Unilaterally and/or discriminatorily withholding bereavement pay and vacation pay from strikers.

(d) Instituting any polygraph policy without first bargaining in good faith to impasse with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of its employees.

(e) Discharging employees pursuant to its unlawfully instituted polygraph examination policy and/or in order to retaliate against employees for agreeing to give testimony before the Board.

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(f) Failing and refusing to recognize and bargain with the Union as the exclusive representative of Respondent's employees employed at, out of, or dispatched from its Patchogue facility, including drivers, platform men and servicemen, and/or failing and refusing to provide the Union with the names and addresses of employees in the appropriate collective-bargaining unit.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer striking employees who made an unconditional offer to return to work immediate and full reinstatement to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges, discharging if necessary employees of Respondent's sister companies who have been used to perform unit work to avoid recalling strikers and new employees who have been hired by Respondent since 15 April 1983.

(b) Offer Ralph Kendrick immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges.

(c) Make whole Ralph Kendrick and striking employees who made an unconditional offer to return to work on 15 April 1983 for any loss of earnings or benefits they may have suffered

by reason of the discrimination against them by paying them a sum of money equal to the amount they normally would have earned from the date of said discrimination to the date of Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

(d) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Make whole employees who have suffered any loss of bereavement pay or vacation pay as a result of Respondent's unlawful actions.

(f) Withdraw and abandon its polygraph policy at least until such time as Respondent bargains in good faith to impasse on the subject with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of Respondent's employees.

(g) Recognize and, on request, bargain with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive

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4. As noted in the body of this decision, Respondent's unlawful discrimination against strikers adversely affected a group or classcomprised of all striking employees. The record does not reflect the relative seniority of all strikers, and it is therefore not possible at this time to determine with certainty which strikers should have been recalled to specific vacancies. I shall therefore leave that determination to the compliance stage of this proceeding.

representative of Respondent's employees employed at, out of, or dispatched from its Patchogue facility, including drivers, platform men and servicemen, excluding office clerical employees, guards and supervisors as defined in the Act.

(h) Provide the Union with the names and addresses of employees in the collective-bargaining unit described above.

(i) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its Patchogue and Deer Park, New York, facilities copies of the attached notice marked "Appendix"[5] Copies of said notices on forms provided by the Regional Director for Region 29, after being signed by Respondent's representative, shall be posted immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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5. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board shall read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the National Labor Relations Act gives employees these rights.

To organize

To form, join, or assist unions

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to offer available positions to strikers who made an unconditional offer to return to work, use employees of sister companies to perform bargaining unit work in order to avoid recalling strikers, or hire new employees without offering those positions to strikers.

WE WILL NOT treat strikers as new employees when they

are recalled to work by making them perform yard work before reassigning them to normal duties.

WE WILL NOT unilaterally and/or discriminatorily withhold bereavement pay or vacation pay from strikers.

WE WILL NOT institute any polygraph policy without first bargaining in good faith to impasse with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of our employees.

WE WILL NOT discharge employees pursuant to our unlawfully instituted polygraph examination policy and/or in order to retaliate against employees for agreeing to give testimony before the National Labor Relations Board.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive representative of employees employed at, out of, or dispatched from our Patchogue facility, including drivers, platform men and servicemen, and/or fail and refuse to provide the Union with the names and addresses of employees in the appropriate collective bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercises of the rights guaranteed them in Section 7 of the Act.

WE WILL offer striking employees who made an unconditional offer to return to work immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges, discharging if necessary employees of sister companies who have

been used to perform unit work in order to avoid recalling strikers and new employees who have been hired since 15 April 1983.

WE WILL offer Ralph Kendrick immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges.

WE WILL make whole Ralph Kendrick and striking employees who made an unconditional offer to return to work on 15 April 1983 for any loss of earnings or benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they normally would have earned from the date of said discrimination to the date of our offer of reinstatement, less net interim earnings, with appropriate interest.

WE WILL remove from our files any reference to the discharge of Ralph Kendrick and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

WE WILL make whole employees who have suffered any loss of bereavement pay or vacation pay because of our unlawful actions.

WE WILL withdraw and abandon our polygraph policy at least until such time as we bargain in good faith to impasse on the subject with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousement and Helpers of America as the representative of our employees.

WE WILL recognize and, on request, bargain with Local

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282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of employees employed at, out of, or dispatched from our Patchogue facility, including drivers, platform men, and servicemen, excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL provide the Union with the names and addresses of employees in the collective-bargaining unit described above.

GLOVER BOTTLED GAS CORP.; VOGEL'S INC.; NEW YORK PROPANE CORP.; SYNERGY GROUP, INC.; SYNERGY GAS CORP.

APPENDIX D — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *NLRB V. GLOVER BOTTLED GAS CORP.*, 905 F.2D 681 (2D CIR. 1990) DECIDED JUNE 13, 1990

No. 1312, Docket 90-4022.

United States Court of Appeals,
Second Circuit

Argued May 7, 1990.

Decided June 13, 1990.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

Local 282 International Brotherhood of Teamsters,

Intervenor,

v.

GLOVER BOTTLED GAS CORP., Synergy Gas Corp., Vogel's Inc., Propane Corp., Synergy Group, Inc.,

Respondent.

* * *

William M. Bernstein, N.L.R.B. (Jerry M. Hunter, General Counsel, Robert E. Allen, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, N.L.R.B., Washington, D.C., of counsel), for petitioner.

Appendix D

Arthur R. Kaufman (Peter A. Schneider, Kaufman, Frank, Naness, Schneider & Rosensweig, Melville, N.Y., of counsel), for respondent.

Before ALTIMARI and MAHONEY, Circuit Judges, and POLLACK*, Senior District Judge.

ALTIMARI, Circuit Judge:

On this appeal we consider whether an employer gave sufficient notice of its withdrawal of recognition from a union so as to commence the limitation period pursuant to Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b) (1982 ed.) ("the Act"). The National Labor Relations Board ("N.L.R.B." and "the Board") petitions for enforcement of its February 8, 1989 order against Glover Bottled Gas Corp. ("Glover"), Vogel's Inc., New York Propane Corp., Synergy Gas Corp. and Synergy Group, Inc. (collectively "the Company"). The Company cross-petitions for a review of the Board's order. Local 282, International Brotherhood of Teamsters ("the Union"), as intervenor, joins in and adopts in its entirety the Board's position on this petition. We have jurisdiction pursuant to Section 10(e) of the Act.

For the reasons discussed below, the Board's application for enforcement of the order is granted; the Company's cross-petition to vacate the order is denied.

BACKGROUND

The Company, which is comprised of several corporations

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* The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

including Glover, acts as a single employer engaged in the sale and distribution of propane gas and related products. Glover and the Union were parties to a collective bargaining agreement covering all drivers, platform workers, and servicemen which expired on July 31, 1982. Between August 1, 1982 and February 2, 1983, Glover and the Union participated in several unsuccessful collective bargaining sessions aimed at reaching a new agreement. On February 3, 1983, the Union commenced a strike against Glover. During the course of the strike, Glover hired eleven permanent replacements for the fifteen strikers. Approximately ten weeks after commencing the strike, the Union notified Glover of the fifteen strikers' unconditional offer to return to work.

In 1983 and 1984, the Union filed charges with the Board alleging several unfair labor practices in violation of the Act. Specifically, the Union alleged that, although Glover reinstated three of the striking employees, Glover failed to pay vacation money for 1983 to all three reinstated employees, assigned two of the three employees to low-skilled jobs normally performed by new employees, and refused bereavement pay to one of the three employees, in violation of Sections 8(a)(1), and 8(a)(3) and 8(a)(5) of the Act. The Union further alleged that, although there were numerous openings and sufficient work, Glover declined to reinstate any of the remaining twelve strikers, and filled the openings by hiring new employees or transferring employees into Glover from other divisions of the Company, in violation of Sections 8(a)(3) and 8(a)(1) of the Act. The Union also alleged that in June of 1984, Glover unilaterally instituted an unlawful mandatory polygraph examination policy, and that shortly thereafter Glover discharged an employee who was scheduled to testify at a Board hearing and who had expressed his intention not to submit to the polygraph examination, in violation of Sections

8(a)(1), 8(a)(4) and 8(a)(5). The various allegations were eventually consolidated, and in May and June of 1986, hearings were conducted in connection with them before Administrative Law Judge McLeod ("the A.L.J.").

From 1983 through 1986, the Union continued to represent the employees at arbitration proceedings. Either in October 1985 or January 1986, the attorneys for Glover and the Union discussed a possible settlement to one of these arbitration proceedings. During this discussion, Glover's legal counsel informed an attorney for the Union of his doubt that the Union could be presumed to represent the employees. On April 9, July 1, and August 8, 1986, the Union sent written requests to meet and bargain with Glover. Glover failed to respond to these requests, and on September 26, 1986, the Union filed a charge alleging a violation of Sections 8(a)(5) and 8(a)(1) of the Act. At a subsequent hearing before the A.L.J. in connection with this charge, Glover's legal counsel testified about his January conversation with the Union attorney:

> [I]t was in response to his saying that we had this continuing obligation to negotiate on these subjects and I told him that we didn't recognize having an obligation, that we didn't think that they not only didn't [sic] represent the majority, but that they didn't [sic] represent anybody and that's the phrase I used.

The record is bereft of any indication that the Glover attorney commemorated a notice of withdrawal of recognition of the Union at the time of his discussion with the Union attorney.

Appendix D

In a lengthy and thorough opinion, dated August 26, 1987, the A.L.J. found in favor of the Union, and thereafter, the A.L.J.'s decision was affirmed by a panel of the N.L.R.B. The Board found that the Company: (1) treated returning strikers as new employees and withheld vacation and bereavement pay from returning strikers, in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act; (2) discharged an employee in retaliation for his agreement to give testimony before the Board under the guise that he refused to submit to polygraph policy which policy was determined to be unlawful, in violation of Sections 8(a)(1), 8(a)(4) and 8(a)(5) of the Act; (3) failed to offer available positions to striking employees who made an unconditional offer to return to work, in violation of Sections 8(a)(3) and 8(a)(1) of the Act; and (4) refused to bargain with, or provide information, to the Union, in violation of Sections 8(a)(5) and 8(a)(1) of the Act. On this appeal, the Company does not contest that it engaged in the unfair labor practices specified in the Board's first two findings.

DISCUSSION

At the outset, we note that Congress has entrusted the Board with primary responsibility for developing and applying national labor policy, and consequently, a Board rule is entitled to considerable deference so long as it is rational and consistent with the Act. *See N.L.R.B. v. Curtin Matheson Scientific, Inc.*, ___ U.S. ___, 110 S.Ct. 1542, 1549, 108 L.Ed.2d 801 (1990); *N.L.R.B. v. Cooper Union for Advancement of Science and Art*, 783 F.2d 29, 31 (2nd Cir.), *cert. denied*, 479 U.S. 815, 107 S.Ct. 70, 93 L.Ed.2d 27 (1986). Moreover, the Act "vests primary responsibility in the [N.L.R.B.] ... to resolve ... difficult questions of fact." *N.L.R.B. v. American Geri-Care, Inc.*, 697 F.2d 56, 59 (2nd Cir.1982), *cert. denied*, 461 U.S. 906, 103 S.Ct.

1876, 76 L.Ed.2d 807 (1983). On appellate review, the Board's findings will not be overturned if they are supported by "substantial evidence." *See N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1149, 10 L.Ed.2d 308 (1963); *N.L.R.B. v. S.E. Nichols, Inc.*, 862 F.2d 952, 956 (2nd Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3162, 104 L.Ed.2d 1025 (1989). Recently, we elucidated the substantial evidence rule by stating: "even if we disagree with the Board's findings, reversal based upon . . . [a] factual question will only be warranted if, after looking at the record as a whole, we are left with the impression that no rational trier of fact could reach the conclusion drawn by the Board." *N.L.R.B. v. Springfield Hospital*, 899 F.2d 1305, 1310 (2nd Cir.1990). Accordingly, our "scope of review on petition for enforcement of an NLRB order is properly quite limited." *American Geri-Care*, 697 F.2d at 59.

The Company first argues that the Board erred when it found that the Company violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to bargain with, or provide information to, the Union. Specifically, the Company contends that it officially withdrew recognition from the Union during a January 1986 meeting between their attorneys, and that pursuant to the six month period provided for in Section 10(b) of the Act, the September 26, 1986 charge was not timely filed. We disagree.

Section 10(b) of the Act provides that "no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." *See* 29 U.S.C. § 160(b). Several of the Courts of Appeals have adopted the rule that "[t]he 10(b) period begins when the victim of an unfair labor practice receives *unequivocal notice* of a final adverse decision." *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739, 746 (7th Cir. 1989); *accord Teamsters Local Union No. 42 v. N.L.R.B.*,

825 F.2d 608, 616 (1st Cir.1987) ("As . . . no unequivocal notice . . . was communicated. . . . the unfair labor practice was timely filed. . ."); *N.L.R.B. v. Allied Products Corp., Richard Bros. Div.*, 548 F.2d 644, 650 (6th Cir.1977) ("[T]he six month limitation period does not begin to run until the employer's unlawful activity . . . has become known to the charging party."). The unequivocal notice rule rests on the fundamental procedural objective of promoting prompt filing of ripe charges while not precipitating premature filing. Particularly in the area of labor relations disputes where rumors and suspicions can abound, the 10(b) limitations period ought not to commence until an aggrieved party has actual knowledge "of the facts necessary to support a present, ripe, unfair labor practice charge." *Esmark*, 887 F.2d at 746. It follows that for the purposes of Section 10(b), a charging party must receive unequivocal notice of an employer's withdrawal of recognition of a union's majority status.

In the instant case, we think that " 'substantial evidence on the record considered as a whole,' " *American Geri-Care*, 697 F.2d at 59 (quoting *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 871 (2nd Cir. 1970), *cert. denied*, 402 U.S. 907, 91 S.Ct. 1378, 28 L.Ed.2d 641 (1971)), supports the Board's determination that the Union had not received unequivocal notice from the Company. The Board based its determination on the ground that statements made by Glover's legal counsel in association with the January 1986 arbitration amounted to an expression of opinion and not to an actual notice of withdrawal of recognition. As the A.L.J. observed, Glover's legal counsel, an experienced labor attorney, would be unlikely to communicate a withdrawal of recognition except in a clear and exact manner. This observation is bolstered by the fact that no record was made at the time of the informal discussion between the attorneys and that we must now rely on the legal counsel's recollection of the

conversation as recalled in the testimony before the A.L.J. Further, the A.L.J. noted that the purpose of the January 1986 meeting was to discuss a possible settlement to a specific arbitration proceeding and not to bargain over Glover's changes in employee benefits and working conditions. Moreover, the January conversation between attorneys for Glover and the Union occurred in the absence of any pending request from the Union to Glover to bargain. As our scope of review is "quite limited", *American Geri-Care,* 697 F.2d at 59, and findings of the Board " 'cannot lightly be overturned' ", *id.* at 60 (quoting *N.L.R.B. v. Advanced Business Forms Corp.,* 474 F.2d 457, 464 (2nd Cir. 1973) (citations omitted)), we see no reason to repudiate the Board's finding that the statement by Glover's legal counsel did not amount to an unequivocal notice of withdrawal. Accordingly, the Company's assertion of the affirmative defense based on the statute of limitations in Section 10(b) of the Act must fail.

In the alternative, the Company argues that the Board was required to dismiss the charge that the Company failed to bargain with, or provide information to, the Union pursuant to *Jefferson Chemical Co., Inc.,* 200 N.L.R.B. 992 (1972). In that case the Board held that where a broad "refusal to bargain collectively charge" had previously been litigated, the General Counsel was precluded from subsequently litigating a "surface bargaining charge" which arose out of facts that could have been discovered in connection with the previous litigation. *Id.* According to the Company, the holding in *Jefferson Chemical* prohibited the Board from considering the Union's withdrawal of recognition charge since the facts supporting the charge transpired before the May and June 1986 hearings on the other alleged unfair labor practices. To the contrary, the Board affirmed the A.L.J.'s rejection of the Company's position since at the time of the earlier

hearings it simply was not yet clear that Glover had actually withdrawn recognition from the Union. Additionally, "[a]lthough the Board's decisions are by no means immune from attack", we must defer to the Board where "its explication is not inadequate, irrational or arbitrary." *Erie Resistor,* 373 U.S. at 236, 83 S.Ct. at 1149. The Board is best suited to interpret its own precedent and to apply it to the facts of a particular case, *see N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66, 95 S.Ct. 959, 967-68, 43 L.Ed.2d 171 (1975), and its interpretation here, in light of the finding that Glover failed to provide unequivocal notice of withdrawal, cannot be said to be inadequate, irrational or arbitrary.

The Company next argues that the Board erred by failing to find that the Union had lost majority status based on the anti-union sentiments of the employees, and that the Company was under no obligation to bargain with the allegedly defunct Union. An employer seeking to terminate a collective bargaining relationship by withdrawing recognition from a Union must rebut a presumption of continued majority status " '1) by showing that on the date recognition was withdrawn, the union did not in fact enjoy majority support, or 2) by presenting sufficient evidence to show that the refusal to bargain was based on a serious good faith doubt of the union's majority.' " *N.L.R.B. v. Windham Community Memorial Hospital,* 577 F.2d 805, 811 (2nd Cir. 1978) (quoting *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 489 (2nd Cir. 1975)); *see also Curtin Matheson,* 110 S.Ct. at 1549-50. The "determination of the sufficiency of the employer's evidence regarding loss of majority status or good faith doubt is a question of fact for the Board which is subject to limited review." *N.L.R.B. v. Koenig Iron Works, Inc.*, 681 F.2d 130, 137 (2nd Cir. 1982) (citing *Windham,* 577 F.2d 805, 811, and *Orion Corp. v. N.L.R.B.*, 515 F.2d 81, 85-86 (7th Cir. 1975)).

Appendix D

Although the Union made no formal requests for bargaining between 1983 and 1986, the Board found that during this time period the Union had been actively involved in representing employees before the Board in unfair labor practice proceedings, before arbitrators, and before this Court on several occasions. Further, the Supreme Court recently upheld the Board's rule articulated in *Station KKHI,* 284 N.L.R.B. 1339 (1987), *enforced sub nom. N.L.R.B. v. Buckley Broadcasting Corp. of Cal.,* 891 F.2d 230 (9th Cir. 1989), which refuses to adopt a general presumption about the sentiments of striker replacements as a basis for determining the loss of a union's majority status. *Curtin Matheson,* 110 S.Ct. at 1554. Thus, the Company has not met its burden to show that on the date it claims to have withdrawn recognition, the union did not actually enjoy majority status. In addition, "[a]n employer cannot use the good-faith doubt defense to reap benefit from its own unfair labor practices." *Proxy Communications of Manhattan, Inc. v. N.L.R.B.,* 873 F.2d 552, 54 (2nd Cir. 1989) (citing *N.L.R.B. v. Fotochrome, Inc.,* 343 F.2d 631, 633 (2nd Cir.), *cert. denied,* 382 U.S. 833, 86 S.Ct. 76, 15 L.Ed.2d 76 (1965)). In the instant case, it is uncontroverted that the Company engaged in various unfair labor practices. Accordingly, we agree with the Board that the Company has failed to rebut the presumption of the Union's majority status.

Finally, the Company also contests the Board's determination that the Company violated Sections 8(a)(3) and 8(a)(1) of the Act by failing to offer available positions to striking employees who, through the Union, made an unconditional offer to return to work. An employer who denies or delays reinstatement following employees' unconditional offers to return to work violates the Act absent a showing of "a substantial and legitimate business reason for refusing reinstatement." *Koenig Iron Works,* 681 F.2d at 145; (citing *N.L.R.B. v. Great*

Dane Trailers, Inc., 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), and *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 377-79, 88 S.Ct. 543, 545-46, 19 L.Ed.2d 614 (1967)). Here, the Company does not offer any business reason for its failure to reinstate, but only asserts that a questionnaire it mailed to strikers constitutes a valid offer of reinstatement. To the contrary, the Board found that the questionnaire did not include an offer of reinstatement, but simply sought information regarding availability. Applying the substantial evidence rule, we perceive no reason why the Board's finding should be set aside. *See Erie Resistor*, 373 U.S. at 236, 83 S.Ct. at 1149; *S.E. Nichols*, 862 F.2d at 956.

CONCLUSION

We have examined the Company's remaining contentions and find them to be without merit. For all the foregoing reasons, the N.L.R.B.'s petition for enforcement of its order is granted. The Company's cross-petition is denied.

APPENDIX E — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS, *LA FAVORITA, INC. V. NLRB* FILED JANUARY 27, 1995

THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-9522
(Nos. 27-CA-11014-8, 27-CA-11210, 27-CA-11386)
(Petition for Review)

Spielberg/solo 313 NLRB No. 168

LA FAVORITA, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

ORDER AND JUDGMENT*

Before KELLY and SETH, Circuit Judges, and KANE,** District Judge.

**Honorable John Kane, Jr., Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Appendix E

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

La Favorita, Inc., petitions, pursuant to 29 U.S.C. § 160(f), to set aside or modify an order of the National Labor Relations Board (Board) awarding back pay in the amount of $7,476.00 to Valentin Garcia and $10,982.37 to Petronilo Garcia. The Board applies, pursuant to 29 U.S.C § 160(e), for enforcement of the order We deny the petition and grant the Board's application for enforcement.

In earlier proceedings, the Board found that La Favorita violated the National Labor Relations Act (Act) by refusing to rehire Valentin Garcia because or his union activities, and by retaliating against Petronilo Garcia because he testified against La Favorita at a Board proceeding. It ordered La Favorita to reinstate both individuals and make them whole for loss of earnings, with back pay to be calculated pursuant to *F.W. Woolworth*, 90 NLRB 289 (1950). We enforced both orders. *NLRB v. La Favorita Inc.*, 963 F.2d 32 (Table), No. 91-9543 (10th Cir. May 26, 1992); *La Favorita. Inc. v. NLRB*, 977 F.2d 595 (Table), No. 92-9509 (10th Cir. Sept. 30, 1992).

La Favorita offered to reinstate both Garcias, and both offers were refused. In a supplemental decision, the Board determined the Garcia's back pay under the formula set forth in *F.W. Woolworth*. This formula provides that an employee's net earnings, if any, are deducted from what the employee would have earned for such quarter if he had not been discharged. *F.W. Woolworth*, 90 NLRB at 293. Earnings in one quarter have no effect on back pay liability for any other quarter. *Id.*

Appendix E

La Favorita challenges the Board's application of the *F.W. Woolworth* formula. The applicability of the *F.W. Woolworth* formula was not raised in the earlier enforcement proceedings before this court, and we did not address it. However, no authority has been cited that would foreclose La Favorita from challenging use of the formula in this proceeding because it failed to raise it in the previous enforcement proceedings.

La Favorita contends that application of the *F.W Woolworth* formula is inequitable because it more than makes the Garcias whole for income lost due to La Favorita's violation of the Act. It urges use of a formula whereby total actual earnings are subtracted from the total pay the Garcias would have earned had they continued to work for La Favorita.[1]

The Board has broad discretion to order a remedy for a violation of the Act, subject to limited judicial review. *Monfort, Inc. v. NLRB*, 965 F.2d 1538, 1546 (10th Cir. 1992). "[W]e must give special 'respect' to the Board's choice" of a remedy for a violation of the Act. *Id.* (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969)). However, our deference ends where the Board attempts " 'to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

The Board's use of the *F.W. Woolworth* formula was approved by the Court in *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). The Court observed that before adopting the *F.W. Woolworth* formula the Board had computed back pay in the manner advocated by La Favorita. The Board concluded, however, that that remedy failed to effectuate the purposes and

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1. For example, Valentin Garcia would be entitled to $2,701.62, rather than $7,476, if back pay were computed under La Favorita's formula.

policies of the Act. *Seven-Up Bottling Co.*, 344 U.S. at 347. The problem was that if an employee obtained a better paying job sometime after discharge, it became profitable for the employer to delay an offer of reinstatement as long as possible, because the employee's interim earnings from the new, higher-paying job would reduce the employer's back pay liability. *Id.* Additionally, under the old formula the employee would be pressured to waive the right to reinstatement so as to prevent the continuing reduction of back pay. *Id.* The Court concluded that the Board had authority to fashion the remedies of back pay and reinstatement so as to complement rather than conflict with one another. *Id.* at 348.

La Favorita, however, relies on the dissent in that case which opined that the formula should not be used where an employer's business fluctuates such that an employee would have high income in one quarter and low income in the next. *Id.* at 352. La Favorita contends this case presents such a situation, noting that Valentin Garcia would have earned $5,606 at La Favorita in the third quarter of 1991, but only $3,576 in the second quarter of 1992.[2]

Although the dissent is not binding, the majority in *Seven-Up Bottling* did indicate that the Board should not apply *F.W. Woolworth* "without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *Seven-Up Bottling*, 344 U.S. at 349. Here, the bulk of the back pay awarded Valentin Garcia accumulated between the fourth quarter of 1989 and the first quarter of 1991. Considering all the full quarters that back pay accumulated, with one exception,[3] the highest total gross

2. The difference is attributable to a difference in overtime he would have worked.

3. The third quarter of 1991 was an anomaly with a total gross back pay of $5,606. However, Valentin Garcia's net back pay from that quarter was only $368.

back pay was $4,894 in the third quarter of 1990, and the lowest was $4,301 in the second quarter of 1990, a difference of less than $600. The Second Circuit concluded that a variation in quarterly earnings that was higher than this, and that constituted a much larger proportion of the quarterly earnings, was not of a sufficient magnitude to compel the Board to depart from the *F.W. Woolworth* formula. *NLRB v. Local 138, Int'l Union of Operating Eng'rs*, 380 F.2d 244, 251-52 (2d Cir. 1967).[4] We reach the same conclusion here and hold the Board acted within its broad remedial power in computing back pay under the *F.W. Woolworth* formula.

La Favorita next argues that Petronilo Garcia's back pay should have terminated in November 1991 when he voluntarily quit his job with Eaton Metal Products. While La Favorita did not raise this precise argument before the Board, it did contend that back pay for Petronilo Garcia should have terminated permanently when he left an earlier job. Because the legal principle is the same, we address the contention.

The Board excluded from the back pay computation the period of time from November 5 to December 31, 1991, when Petronilo Garcia removed himself from the labor market, but included the period after he returned to work on January 3, 1992. We see no error. A voluntary quitting of interim employment does not bar an employee from recovery of any back pay for the whole period of discrimination; rather, it merely bars recovery for the period when the employee was voluntarily out of the labor market. *East Texas Steel Castings Co.*, 116 NLRB 1336, 1347-48 (1956), *enforced*, 255 F.2d 284 (5th Cir. 1958), *clarified*, 281 F.2d 686 (5th. Cir. 1960).

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4. In *Local 138*, the greatest variation was between earings of $1,193 and $1,967, a difference of $774. 380 F.2d at 252.

Appendix E

The petition for review is DENIED. The National Labor Relations Board's request for enforcement is GRANTED.

Entered for the Court

John L. Kane, Jr.
Senior District Judge

(2)

No. 94-1987

Supreme Court, U.S.
FILED
AUG 2 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

GLOVER BOTTLED GAS CORP., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, on the record in this case, the court of appeals correctly held petitioners' challenge to the National Labor Relations Board's computation of backpay to a discriminatee to be barred by *res judicata*.

2. Whether the Board's award of backpay to two discriminatees was supported by substantial evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1987

GLOVER BOTTLED GAS CORP., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is reported at 47 F.3d 1230. The decision and order of the National Labor Relations Board (Pet. App. 5a-8a) and the decision of the administrative law judge (Pet. App. 9a-24a) are reported at 313 N.L.R.B. 43.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1995. The petition for a writ of certiorari was filed on June 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are engaged in the sale and distribution of propane gas and related products in the New York metropolitian area. Pet. App. 31a-32a.[1] In February 1983, Local 282 of the International Brotherhood of Teamsters (the Union) called an economic strike against petitioners, who responded by hiring permanent replacements for the strikers. *Id.* at 33a, 34a. In April 1983, the Union made an unconditional offer to return to work on behalf of the striking employees. Although positions were available, petitioners refused to reinstate any of the strike participants. *Id.* at 35a, 41a. In response, the Union filed unfair labor practice charges with the National Labor Relations Board, charging petitioners with discrimination based on protected union activity. On February 8, 1989, the Board found, *inter alia*, that petitioners' refusal to reinstate the strikers to available positions violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), and that petitioners violated Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), by discharging Union steward Ralph Kendrick in July 1984 in retaliation for his agreement to give testimony in a Board proceeding. Pet. App. 25a, 61a, 73a, 74a.[2] The Board ordered petitioners

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[1] The five petitioners in this case—Glover Bottled Gas Corp., Vogel's, Inc., New York Propane Corp., Synergy Gas Corp., and Synergy Group, Inc.—stipulated before the National Labor Relations Board that they constitute a single employer for purposes of the National Labor Relations Act. Pet. App. 29a.

[2] Petitioners had discharged Kendrick before the strike began for unrelated reasons, but reinstated him pursuant to an arbitral award after the strike ended. Pet. App. 57a-58a. Peti-

to offer reinstatement to Kendrick and the strike participants, and to make them whole for any loss of earnings they might have suffered, with backpay "to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950)." *Id.* at 77a-78a.[3] On June 13, 1990, the United States Court of Appeals for the Second Circuit enforced the Board's order. *Id.* at 84a-94a.

2. a. Thereafter, the Board's General Counsel issued a specification of the amount of backpay that petitioners owed Kendrick and the strike participants. After a hearing, the administrative law judge (ALJ), applying the Board's *F.W. Woolworth* formula for calculating "net" backpay awards, found that Kendrick was entitled to $13,878.38, and that strike participants Joseph Leone and Robert Cabral were entitled to $19,950.61 and $2,522.63, respectively, plus interest, for the period beginning on the date of petitioners' unlawful conduct and ending March 4,

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tioners subsequently discharged Kendrick again, this time, as noted above, in violation of the Act.

[3] Under *F.W. Woolworth*, backpay is computed "on the basis of each separate calendar quarter or portion thereof during the period from the [employer's] discriminatory action to the date of a proper offer of reinstatement." 90 N.L.R.B. at 292-293. The backpay award is calculated "by deducting from a sum equal to that which [the employee] would normally have earned for each such quarter or portion thereof, [his] net earnings, if any, in other employment during that period." *Id.* at 293 (footnote omitted). Moreover, "[e]arnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter." *Ibid.* This Court upheld the Board's *F.W. Woolworth* formula in *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344 (1953).

1991, the date on which petitioners extended to them a valid offer of reinstatement. Pet. App. 13a, 23a, 78a.

The ALJ rejected petitioners' contention that any award of backpay to Kendrick would amount to an impermissible "windfall" because his total interim earnings exceeded his total gross backpay. Pet. App. 23a-24a. The ALJ explained that, under *F.W. Woolworth*, net backpay is calculated on an independent, quarterly basis, and noted that "[petitioners] do[] not dispute that in 4 of the 27 calendar quarters of his backpay period, [Kendrick] had no earnings to offset the gross backpay due him for each of those quarters." *Ibid.*

The ALJ also rejected petitioners' contention that Leone's backpay award should be reduced because, petitioners alleged, he quit equivalent jobs at two trucking companies—Gould, Inc., and Treadways Express—without good cause. *Id.* at 20a-21a. The ALJ agreed with petitioners that "[a] discriminatee who, without good cause, quits a comparable job with an interim employer has thereby incurred a willful loss of earnings, warranting a reduction in backpay." *Id.* at 21a. The ALJ found, however, that Leone was justified in resigning from Gould, Inc., because that firm had required him to drive consecutive hours in excess of Department of Transportation regulations, and that Leone was justified in leaving Treadways Express because "business got very slow" at that firm and Leone was able to find "steady work" in Florida. *Ibid.*

Lastly, the ALJ rejected petitioners' contention that Cabral was not entitled to any backpay because he had left equivalent employment at Crestwood Metals Corp. in order to accept a position as a cross-country driver for Big Bee Transportation Co. *Id.* at

21a-23a. The ALJ found that Cabral's driver/yard laborer position at Crestwood Metals was not in fact equivalent to his former job with petitioners, and that Cabral was therefore justified in leaving Crestwood Metals in 1987 "in search of a more desirable job." *Id.* at 22a-23a.

b. The Board affirmed the ALJ's findings and conclusions and, with a minor modification not relevant here, adopted his backpay order. Pet. App. 5a-8a.

3. The court of appeals enforced the Board's backpay order. Pet. App. 3a-4a. The court noted that the Second Circuit had already enforced the Board's underlying unfair labor practice findings, and that two of the issues raised before the court—including the question "whether the calculation of * * * discriminatee[] [Kendrick's] back pay award should be performed pursuant to the traditional *F.W. Woolworth* quarterly formula—were actually decided by the Second Circuit, and are, therefore, *res judicata*." *Id.* at 4a. The court concluded that "[n]one of the rest of the factual issues [raised by petitioners] come [*sic*] close to raising a legal question (substantial evidence on the whole record), and we therefore wonder why the employer would bring his second petition to either court of appeals." *Ibid.*

ARGUMENT

1. a. Petitioners contend (Pet. 12) that the court of appeals' decision, insofar as it sustained on *res judicata* grounds the Board's use of its *F.W. Woolworth* formula to compute Kendrick's backpay award, "squarely conflicts" with the decision of the Tenth Circuit in *La Favorita, Inc.* v. *NLRB*, 48 F.3d 1232 (1995) (Table) (*reproduced at* Pet. App. 95a-100a). There is no merit to that contention.

In *La Favorita*, the court concluded in an unpublished opinion that, because "[t]he applicability of the *F.W. Woolworth* formula was not raised in the earlier enforcement proceedings before this court, and [the court] did not address it," the court would entertain the employer's challenge to the use of that formula on review of a Board backpay order. Pet. App. 97a.[4] Here, by contrast, the court of appeals found that the Second Circuit, in the earlier enforcement proceeding, "actually decided" the question whether Kendrick's backpay award "should be performed pursuant to the traditional *F.W. Woolworth* quarterly formula." *Id.* at 4a. Although petitioners assert (Pet. 5-6, 13) that that question was neither litigated before nor considered by the Second Circuit in the earlier enforcement proceeding, that assertion is insufficient to undermine the court of appeals' application here of familiar principles of *res judicata*.[5]

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[4] The *La Favorita* court went on to reject the employer's claim that the Board should have applied a formula "whereby total actual earnings are subtracted from the total pay the [discriminatees] would have earned had they continued to work for [the employer]," holding instead that "the Board acted within its broad remedial power" in applying the *F.W. Woolworth* formula. Pet. App. 97a, 99a. The *La Favorita* court, therefore, rejected the substantive argument that petitioners make here. See pp. 7-9, *infra*. The allegedly conflicting decisions are thus consistent in outcome.

[5] We note that, in the earlier proceeding, the Second Circuit "granted" the Board's "petition for enforcement of its order" (Pet. App. 94a), and that the Board's order had specified, in its provision requiring make-whole relief, that backpay was "to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950)" (*id.* at 78a). The doctrine of *res judicata*, of course, applies not only to issues the losing party actually raised in the earlier proceeding, but also to issues

That holding by the court below is case-specific and raises no issue warranting further review.

b. In any event, there is no merit to petitioners' contention (Pet. 18) that the Board's use of the *F.W. Woolworth* formula to calculate Kendrick's backpay resulted in an impermissible "windfall" to Kendrick. Prior to the *F.W. Woolworth* decision, the Board had calculated backpay as "the difference between (a) what the employee would have earned in the position which was discriminatorily terminated and (b) what he actually earned in other employment during the *entire period* commencing on the date of discrimination and ending with the date of offer of reinstatement." *F.W. Woolworth Co.*, 90 N.L.R.B. 289, 291 (1950) (emphasis added). Based on its cumulative experience in enforcing the Act, however, the Board concluded that its original methodology had wrought a "deleterious effect upon the companion remedy of reinstatement," *id.* at 292, and, consequently, that the old formula "f[ell] short of effectuating the basic purposes and policies of the Act," *id.* at 291. Specifically, the Board's experience demonstrated that

> [w]hen an employee, sometime after discharge, obtained a better paying job than the one he was discharged from, it became profitable for the employer to delay an offer of reinstatement as long as possible, since every day the employee put in on the better paying job reduced back pay liability. Again, the old formula, in the same circumstances, put added pressure on the employee to waive his right

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it could have raised. See Restatement (Second) of Judgments § 24 (1982). The Tenth Circuit's reasoning to the contrary in its unpublished opinion in *La Favorita*, *supra*, was unnecessary to the result in that case. See note 4, *supra*.

> to reinstatement, since by doing so he could terminate the running of back pay and prevent the continuing reduction of the sum coming to him. To avoid these consequences the Board laid down its new method of computation.

NLRB v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 347-348 (1953). In *Seven-Up Bottling Co.*, this Court upheld the Board's adoption of the *F.W. Woolworth* formula as within the Board's "discretionary power to mould remedies suited to practical needs." *Id.* at 351-352.

Petitioners, in effect, seek a return to the old formula under which they would have profited by their delay in offering Kendrick reinstatement. Petitioners unlawfully discharged Kendrick on July 10, 1984, but they did not offer him reinstatement until March 4, 1991. Kendrick suffered four calendar quarters of unemployment prior to that date, and the Board awarded him backpay for only those quarters. Pet. App. 23a-24a.[6] Under the old formula of calculating backpay over the entire period between the discrimination and the offer of reinstatement, petitioners would have reduced their monetary liability by virtue of their delay in offering Kendrick reinstatement. Under this Court's decision in *Seven-Up Bottling Co.*, however, it is settled that the Board may utilize the quarterly method of computing backpay in

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[6] Although petitioners assert (Pet. 19) that "[i]t was only in the first quarter of 1990 * * * that for three months [Kendrick] did not secure employment," the Board's specific finding to the contrary raises only an evidentiary matter that does not warrant further review. Indeed, the ALJ stated that the finding was undisputed. Pet. App. 23a.

order to deter avoidance of the employer's reinstatement obligation.

Petitioners assert (Pet. 16) that the facts surrounding Kendrick's post-discrimination employment make application of the *F.W. Woolworth* formula inappropriate in this case. As this Court observed in *Seven-Up Bottling Co.*, however, "in devising a remedy the Board is not confined to the record of a particular proceeding." 344 U.S. at 349. Petitioners have not identified the type of unique circumstances that would make *F.W. Woolworth* relief "oppressive and therefore not calculated to effectuate a policy of the Act," *ibid.*, and, in any event, their fact-bound remedial argument does not warrant this Court's review.

2. Petitioners contend (Pet. 19-21) that the court of appeals' enforcement of the Board's award of backpay to employees Leone and Cabral conflicts with decisions of other courts of appeals. The cases on which petitioners rely, however, are factually inapposite. In each of those cases, the court found, based on the record before it, that the employee in question had incurred a willful loss of earnings by quitting his or her interim employment without sufficient justification. See, *e.g.*, *NLRB* v. *Hopcroft Art & Stained Glass Works, Inc.*, 692 F.2d 63, 65 (8th Cir. 1982); *NLRB* v. *Aycock*, 377 F.2d 81, 84-85 (5th Cir. 1967). Here, however, the Board found that both Leone and Cabral left their positions for specific, justifiable reasons (Pet. App. 20a-23a) and, therefore, did not incur a willful loss of earnings. Although petitioners disagree with the Board's factual findings (Pet. 21-23), those findings were sustained by the court of appeals as supported by substantial evidence (Pet. App. 4a), and raise no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340

U.S. 474, 490-491 (1951) (this Court will disturb a court of appeals' application of the substantial evidence standard "only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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